

CLERK'S COPY.
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 261

**OTTO A. CASE, AS COMMISSIONER OF PUBLIC
LANDS OF THE STATE OF WASHINGTON, PETI-
TIONER,**

vs.

**CHESTER BOWLES, ADMINISTRATOR, OFFICE OF
PRICE ADMINISTRATION, AND SOUNDVIEW
PULP COMPANY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED JULY 29, 1945.

CERTIORARI GRANTED OCTOBER 15, 1945.

No. 10916

United States
Circuit Court of Appeals

For the Ninth Circuit.

**CHESTER BOWLES, Administrator, Office of
Price Administration,**
Appellant,

vs.

**JACK TAYLOR, as Commissioner of Public Lands
of The State of Washington and SOUND-
VIEW PULP COMPANY, a Washington
Corporation,**
Appellees.

Transcript of Record

**Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Affidavit in Support of Motion for Order to Show Cause and for Temporary Restraining Order	8
Affidavit re Motion to Extend Time to Docket Record	43
Answer of Defendant Jack Taylor	19
Answer of The Soundview Pulp Company	27
Appeal:	
Affidavit re Motion to Extend Time to Docket Record on	43
Certificate of Clerk to Transcript of Record on	49
Motion for Extension of Time to Docket Record on	42
Notice of	41
Order Extending Time for Docketing Record on	44
Statement of Points on (CCA)	65
Statement of Points on (DC)	47
Stipulation for Designation of Record on	45

Index

Page

Certificate of Clerk to Transcript of Record on Appeal	49
Complaint for Injunction	2
Decision, Court's Oral	56
Judgment	38
Minute Entries:	
July 28, 1944—Hearing	11
Aug. 4, 1944—Hearing	15
Aug. 11, 1944—Hearing	35
Aug. 21, 1944—Presentation of Findings of Fact and Conclusions of Law	37
Motion for Extension of Time to Docket Record on Appeal	42
Affidavit in Support of	43
Motion for Temporary Restraining Order and Preliminary Injunction	7
Affidavit in Support of	8
Motion to Convene Three-Judge Court	16
Motion to Dismiss and to Dissolve Temporary Restraining Order	17
Motion to Strike	33
Names and Addresses of Attorneys	1
Notice of Appeal	41

Index

Page

Order Extending Time for Docketing Record on Appeal	44
Order to Show Cause for Preliminary Injunc- tion	12
Statement of Points on Appeal (CCA)	65
Statement of Points on Appeal (DC)	47
Stipulation for Designation of Record	45
Temporary Restraining Order and Order to Show Cause	12
Transcript of Proceedings (Partial)	51
Proceedings in U. S. C. C. A., Ninth Circuit	67
Stipulation for substitution of defendant-appel- lee	68
Order of submission	69
Order directing filing of opinion and decree	70
Opinion, Healy, J.	71
Decree	77
Praecipe and designation of record	78
Order staying issuance of mandate	80
Clerk's certificate	81
Order allowing certiorari	82

ATTORNEYS OF RECORD

FLEMING JAMES, JR.,

Director, Litigation Division,

GEORGE H. LAYMAN,

District Enforcement Attorney,

ABRAHAM GLASSER,

Special Appellate Attorney,

C. E. HUGHES

Litigation Attorney

Office of Price Administration,

3337 White-Henry-Stuart Building

Seattle, Washington

Attorneys for Plaintiff-Appellant.

SMITH TROY

Attorney General, State of Washington

R. A. MOEN,

Assistant Attorney General, State of Wash-
ington,

Olympia, Washington.

KERR, McCORD & CAREY

1309 Hoge Building,

Seattle, Washington.

Attorneys for Defendant-Appellees.

Chester Bowles vs.

In the District Court of the United States for the
Western District of Washington, Southern
Division,

Civil No. 649

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

JACK TAYLOR, as Commissioner of Public Lands
of the State of Washington, and SOUND-
VIEW PULP COMPANY, a Washington
Corporation,

Defendants.

COMPLAINT FOR INJUNCTION

Comes Now the above named plaintiff, and for
cause of action against the defendants herein, al-
leges as follows:

I.

That jurisdiction of this action is conferred upon
this Court by Section 205(c) of the Emergency
Price Control Act of 1942, as amended (56 Stat. 23,
765, 57 Stat. 566, Pub. Law 383, 78th Cong; E. O.
9250, 7 F.R. 7871, E.O. 9328, 8 F.R. 4681), herein-
after referred to as the "Act."

II.

That the said plaintiff Chester Bowles is, and at
all times herein mentioned has been, the duly ap-
pointed, qualified, and acting Administrator of the
Office of Price Administration; that defendant Jack

Taylor is, and at all times herein mentioned has been, the duly qualified and acting Commissioner of Public Lands of the State of Washington, with his place of business and residence at Olympia, the State Capital, within the jurisdiction of this Court; and that defendant Soundview Pump Company is, and [1*] at all times herein mentioned has been, a corporation duly organized, qualified, and existing under and by virtue of the laws of the State of Washington, with its principal place of business at Everett, Washington.

III.

That plaintiff, as Administrator of the Office of Price Administration, brings this action for an injunction, pursuant to Section 205(a) of the Act, to enforce compliance with said Act and Maximum Price Regulation 460.

IV.

That now, and at all times herein mentioned, there has been in effect pursuant to said Act Maximum Price Regulation 460 (S. F. R. 11850), which ~~Regulation~~ established maximum prices for sales of timber.

V.

That in the judgment of the Administrator, defendants have engaged in, and are about to engage in, acts and practices which constitute and will constitute a violation of Section 4(a) of the Act and the said Maximum Price Regulation 460; that on

November 23, 1943 defendant Soundview Pulp Company bid the sum of \$86,336.39 for timber located on Section 36, Township 36 North, Range 5 East, WM, Skagit County, Washington, offered for sale by defendant Jack Taylor in his official capacity; that said sum was transmitted to defendant Jack Taylor; that on or about November 26, 1943 defendant Jack Taylor notified defendant Soundview Pulp Company that its said bid was the highest and best bid made at said sale; and that defendant Jack Taylor now threatens to complete said sale, and to deliver to defendant Soundview Pulp Company an appropriate Bill of Sale for said timber, notwithstanding the fact that the maximum price for said timber established by said Maximum Price [2] Regulation 460 is, and at all times herein mentioned has been, the sum of \$77,853.25.

VI.

That plaintiff is informed and believes and therefore alleges that defendant Jack Taylor has received other bids for state timber, and is preparing to consummate additional sales of such timber at prices in excess of those established by said Maximum Price Regulation 460.

Wherefore, the plaintiff demands:

A. A preliminary and final injunction enjoining defendant Jack Taylor, his agents, employees, and attorneys, from:

1. Consummating the proposed transaction with defendant Soundview Pulp Company, involving the sale of timber on Section 36, Township 36 North,

Range 5 East, WM. Skagit County, Washington, for the sum of \$86,336.39, or any sum in excess of the maximum price, and particularly from executing or delivering to defendant Soundview Pulp Company a Bill of Sale or other instrument transferring title to said timber, for a consideration in excess of the maximum price.

2. From otherwise violating or attempting to agree to do anything in violation of Maximum Price Regulation 460, regulating the sales of timber.

B. A preliminary and final injunction enjoining defendant Soundview Pulp Company, its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with defendant from: [3]

1. Consummating the proposed transaction with defendant Jack Taylor, involving the purchase of timber on Section 36, Township 36 North, Range 5 East, WM. Skagit County, Washington, for the sum of \$86,336.39, or any sum in excess of the maximum price, and particularly from accepting from defendant Jack Taylor, a Bill of Sale or other instrument transferring title to said timber, for a consideration in excess of the maximum price.

2. From otherwise violating or attempting to agree to do anything in violation of Maximum Price Regulation 460, regulating the sales of timber.

C. A temporary restraining order restraining defendant Jack Taylor from completing the sale of timber on Section 36, Township 36 North, Range

5 East WM, Skagit County, Washington, to defendant Soundview Pulp Company, and particularly restraining him from executing and delivering a Bill of Sale therefor, for the consideration of \$86,336.39, or any sum in excess of the maximum price, and restraining defendant Soundview Pulp Company from completing said transaction as a buyer, and particularly from accepting any Bill of Sale or other instrument transferring title to said timber for the sum of \$86,336.39, or any sum in excess of the maximum price; and also restraining defendant Jack Taylor from making any other sales, or attempting to do anything in violation of Maximum Price Regulation 460, regulating sales of timber. [4]

D. Such other and further relief as to the Court may seem just and equitable.

FLEMING JAMES JR.

Director, Litigation Division

ABRAHAM GLASSER

Special Appellate Attorney

GEORGE H. LAYMAN

District Enforcement

Attorney

C. E. HUGHES

Litigation Attorney

Attorneys for Plaintiff

Address:

Office of Price Administration

3337 White-Henry-Stuart

Building

Seattle 1, Washington

[Endorsed]: Filed July 28, 1944. [5]

[Title of District Court and Cause.]

MOTION

Comes now the above named plaintiff appearing by his attorney of record, and moves the court for a temporary restraining order, restraining the defendant Jack Taylor from completing the proposed sale of timber on Section 36, Township 36 north, Range 5 E.W.M. Skagit County, Washington, to defendant Soundview Pulp Company, for the sum of \$86,336.39, or any sum in excess of the maximum price therefor, and from executing and delivering a bill of sale, or other instrument transferring title to said proposed purchaser for a consideration in excess of maximum price, restraining him from making any other timber sales, or attempting to do anything in violation of the Maximum Price Regulation #460, and restraining defendant Soundview Pulp Company from completing the said transaction as a buyer, in violation of said Maximum Price Regulation #460.

Plaintiff also moves the court for preliminary injunction enjoining defendants in accord with paragraph A and B of the complaint on file herein, and for an order to show cause why such preliminary injunction should not be granted.

This motion is based upon affidavit of George H.

Layman filed herewith and by reference made a part hereof.

FLEMING JAMES, JR.

Director, Litigation Division

ABRAHAM GLASSER

Special Appellate Attorney

GEORGE H. LAYMAN

District Enforcement

Attorney

C. E. HUGHES

Litigation Attorney

Attorneys for Plaintiff

[Endorsed]: Filed July 28, 1944. [6]

[Title of District Court and Cause.]

**AFFIDAVIT IN SUPPORT OF MOTION FOR
ORDER TO SHOW CAUSE AND FOR
TEMPORARY RESTRAINING ORDER**

State of Washington

County of King—ss

I, George H. Layman, being first duly sworn, depose and say:

That I am District Enforcement Attorney for the Seattle District, Office of Price Administration, and in that capacity have ascertained the following facts in connection with this action:

That on November 23, 1943, defendant Soundview Pulp Company bid the sum of \$86,336.29 for the timber on Section 36, Township 36 north, Range 5 E. W. M., Skagit County, Washington, offered

for sale at public auction by defendant Jack Taylor in his official capacity; that Soundview Pulp Company thereafter deposited the amount of its said bid with defendant Jack Taylor; that the ceiling price for said timber established by Price Regulation #460 was and is the sum of \$77,853.25; but that nevertheless, defendant Jack Taylor on or about November 26, 1943 notified defendant Soundview Pulp Company that it was the highest and successful bidder therefor; and that defendant Jack Taylor now proposes to complete the said transaction and to deliver a bill of sale forthwith.

That, in December, 1943, actions were filed in the Superior Court of the State of Washington for Thurston County, by Soundview Pulp Company, Coos Bay Pulp Corporation, and the State of Washington, on the relation of Coos Bay Pulp Corporation, against Jack Taylor, in his official capacity, involving the transaction above mentioned; that said cases were consolidated for trial, and the court issued a decree enjoining defendant Jack Taylor from consummating the above [7] transaction; that thereafter an appeal was taken to the Supreme Court of the State of Washington, which rendered its decision on July 22, 1944, reversing the judgment of the lower court, and remanding the case with instructions to dismiss; that instead of waiting the statutory thirty day period for the issuance of the remittitur, defendant Jack Taylor has entered into a stipulation for the immediate issuance thereof, and proposes to complete the said transaction without delay.

That should the said sale be completed, a serious precedent will have been established in the sale of state owned standing timber, which is a product of great importance to the war effort, and the excess sale price in this and other cases will constitute a serious disruption of the entire price control structure for this scarce commodity; that should the said sale be completed the said sum of \$86,336.39 will become a part of the state school fund, and no adjustment or refund can be made without action by the Legislature of the State of Washington; and that completion of the said sale would constitute irreparable damage and injury to the price control program, and the public.

I have been informed that defendant Jack Taylor has received other bids for state timber in excess of the applicable ceiling prices, and has withheld completion of the said transactions pending disposition of the Soundview case; and that I am informed and believe that all of said transactions may be completed at unlawful prices prior to the time that notice may be given or hearing held, unless temporarily restrained by order of this court.

That I make this affidavit in support of plaintiff's motion for a temporary restraining order, and an order to show cause why a preliminary injunction should not issue.

Dated July 28, 1944.

GEORGE H. LAYMAN

Subscribed and sworn to before me this 28th day of July, 1944.

PATRICK A. GERAGHTY

Notary Public in and for the state of Washington,
residing at Seattle.

[Endorsed]: Filed July 28, 1944. [8]

United States District Court, for the Western
District of Washington, Southern Division

RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 28th day of July, 1944, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

No. 649

HEARING

Now on this 28th day of July, 1944, this cause comes on for hearing before the court. George H. Layman represents the plaintiff and files complaint for injunction. Files affidavit in support of motion for order to show cause and for temporary restraining order. Filed motion for temporary restraining order. Temporary restraining order and

order to show cause for preliminary injunction signed by the Court and filed, hearing set for August 4 at 10 A.M. [9]

[Title of District Court and Cause.]

**TEMPORARY RESTRAINING ORDER, AND
ORDER TO SHOW CAUSE FOR PRE-
LIMINARY INJUNCTION**

Upon the complaint filed herein, the motion for temporary restraining order and preliminary injunction, and the affidavit of George H. Layman, dated July 28, 1944, and it appearing therefrom that the defendants have been and are about to engage in acts and practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942 as amended, in that defendants have been and are about to violate Maximum Price Regulation 460, and it further appearing that unless restrained forthwith the defendants will continue to engage in such acts and practices with the result to the public of immediate and irreparable damage, and the war effort will be impeded by reason of the fact that such acts and practices contribute to inflation, and adversely affect the price structure particularly involving the scarce war-time commodity of timber, and it further appearing that as long as defendants continue to engage in such acts and practices, any judgment that this court may render in final determination of this

cause will, to that extent, be of no effect; and the court being fully advised in the premises, now therefore,

It Is Hereby Ordered that the defendants appear and show cause at a stated term of this court for the hearing of motions to be held at the Federal Building in Tacoma, Washington on the 4th of Aug., 1944, at 10 A.M. of said day, or as soon thereafter as counsel can be heard, why an order should not be made effective during the pendency of this action as follows:

A. Enjoining Defendant Jack Taylor, his agents employees, attorneys, and all persons in active concert or participation with him from: [10]

1. Consummating the proposed transaction with defendant Soundview Pulp Company, involving the sale of timber on Section 36, Township 36 North, Range 5 East, W.M., Skagit County, Washington, for the sum of \$86,336.39, or any sum in excess of the maximum price, and particularly from executing or delivering to defendant Soundview Pulp Company a Bill of Sale or other instrument transferring title to said timber, for a consideration in excess of the maximum price.

2. From otherwise violating or attempting to agree to do anything in violation of Maximum Price Regulation 460, regulating the sales of timber.

B. Enjoining defendant Soundview Pulp Company, its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with it from:

1. Consummating the proposed transaction with defendant Jack Taylor, involving the purchase of timber on Section 36, Township 36 North, Range 5 East W.M., Skagit County, Washington, for the sum of \$86,336.39, or any sum in excess of the maximum price, and particularly from accepting from defendant Jack Taylor a Bill of Sale or other instrument transferring title to said timber, for a consideration in excess of the maximum price.

2. From otherwise violating or attempting to agree to do anything in violation of Maximum Price Regulation 460, regulating the sales of timber.

C. Granting such other and further relief as to the court may seem just and equitable. A

Sufficient Cause Appearing, It Is Further Ordered that commencing forthwith upon service of this order and continuing until the hearing hereon and until the further order of this court, the defendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them jointly, and severally, hereby are enjoined and restrained from directly or indirectly engaging in or causing any of the acts specified in paragraphs A and B: above set forth. [11]

It Is Further Ordered that defendants shall be immediately served with a copy of this order, together with copies of the complaint, motion and affidavit upon which it is issued, and that such service will be good and sufficient if made upon the defendants on or before July 31st, 1944.

Done in open court this 28th day of July 1944.

CHARLES H. LEAVY

District Judge

Presented and approved by:

GEORGE H. LAYMAN

of Attorneys for Plaintiff

[Endorsed]: Filed July 28, 1944. [12]

In the United States District Court, Western District of Washington, Southern Division

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 4th day of August, 1944, the Honorable Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said Court, to-wit:

[Title of Cause.]

HEARING

No. 649

Now on this 4th day of August, 1944, this cause comes on before the Court for hearing on order to show cause re preliminary injunction. George H. Layman appears for the Government and on oral motion of Mr. Layman, the Court permit Abraham Glasser to appear as associate counsel in above

cause. R. A. Moen appears for Jack Taylor and William Z. Kerr appears for the Soundview Pulp Company. Plaintiff states he is ready. Mr. Moen moves orally for continuance of the hearing for one week. Mr. Kerr agrees to continuance. Mr. Layman offers no objections to continuance. All counsel stipulate orally that temporary restraining order to remain in effect until hearing is had. Upon above oral stipulation of counsel the Court now grants continuance of hearing on show cause until August 11th. [13]

[Title of District Court and Cause.]

MOTION TO CONVENE THREE JUDGE COURT

Comes now defendant Jack Taylor and moves for the convening of a three judge court to hear this cause, pursuant to the provisions of Section 266 of the Judicial Code (28 U.S.C., section 380), for the reason that this action is a suit to enjoin enforcement of Article II, section 16, of the Washington State Constitution and the statutes of the State of Washington relating to the sale of state owned timber.

This motion is based on the files and records herein.

/s/ SMITH TROY

Attorney General

/s/ R. A. MOEN

Assistant Attorney General

Attorneys for defendant Jack Taylor, as Commissioner of Public Lands of the State of Washington.

[Endorsed]: Filed Aug. 8, 1944. [14]

[Title of District Court and Cause.]

**MOTION TO DISMISS AND TO DISSOLVE
TEMPORARY RESTRAINING ORDER**

Comes now Jack Taylor, as Commissioner of Public Lands of the State of Washington, one of the defendants above named, by his undersigned attorneys, and moves for the entry of an order by the court dissolving the temporary restraining order and dismissing this case for the following reasons:

A. The complaint fails to state a cause of action against this defendant upon which relief can be granted.

B. This court does not have jurisdiction over the subject matter or person of this defendant for the reason that jurisdiction in cases of this kind is by law vested exclusively in the United States Supreme Court.

C. If this court does have jurisdiction over the person of this defendant or the subject matter of

this action, the same may be exercised only by a three judge court.

D. Neither the complaint for injuncton nor the affidavit in support of the motion for temporary restraining order alleges any authorization to the attorneys who are purporting to represent the plaintiff, nor are any of the pleadings herein signed by the Attorney [15] General of the United States or by any officer of the Department of Justice as required by law.

E. The temporary restraining order was granted in violation of Rule 65b of the Rules of Civil Procedure for the District Court of the United States in that:

a. No specific acts are shown in the affidavit attached to the complaint that immediate and irreparable injury, loss or damage would have resulted to the applicant before notice could have been served and a hearing could have been had thereon.

b. The restraining order so granted does not define the injury nor does it state why it is irreparable and why the order was granted without notice.

c. The restraining order does not set forth the reasons for its issuance; it is not specific in its terms; and it fails to describe in reasonable detail the act or acts sought to be restrained.

This motion is based upon the files and record herein, and particularly on the affirmative defense set forth in the verified answer of defendant Jack

Taylor, now referred to, and by this reference incorporated herein.

/s/ SMITH TROY

Attorney General

/s/ R. A. MOEN

Assistant Attorney General

Attorneys for defendant Jack Taylor, as Commissioner of Public Lands of the State of Washington.

[Endorsed]: Filed Aug. 8, 1944. [16]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT JACK TAYLOR

Comes now Jack Taylor, as Commissioner of Public Lands of the State of Washington, one of the defendants above named, and for answer to complaint of plaintiff admits, denies and alleges as follows:

I.

Answering paragraph I of said complaint, defendant denies the cited statutes or any other statutes confer jurisdiction of this case upon this court.

II.

Defendant admits the allegations in paragraphs II and VI of said complaint.

III.

Defendant admits the allegations in paragraph III of said complaint, but denies that Section 205(a)

of the Act entitles plaintiff to injunctive relief against this defendant.

IV.

Defendant admits that at all times herein mentioned Maximum Price Regulation 460 has been in effect, but denies that said maximum price regulation has any application to the sales of state owned timber. [17]

V.

Answering paragraph V of said complaint: Defendant admits that on November 23, 1943, defendant Soundview Pulp Company bid the sum of eighty-six thousand three hundred thirty-six dollars and thirty-nine cents (\$86,336.39) for timber located on section 36, township 36 north, range 5 east W.M., Skagit County, Washington, offered for sale by defendant Jack Taylor in his official capacity; that said sum was transmitted to defendant Jack Taylor; that on or about November 26, 1943, defendant Jack Taylor notified defendant Soundview Pulp Company that its said bid was the highest and best bid made at said sale; and that defendant Jack Taylor now threatens to complete said sale, and to deliver to defendant Soundview Pulp Company an appropriate bill of sale for said timber.

Defendant further admits that the maximum price of said timber, as computed under Maximum Price Regulation 460, is seventy-seven thousand eight hundred fifty-three dollars and twenty-five cents (\$77,853.25), but defendant denies each and every other allegation of said paragraph and espe-

cially denies that Maximum Price Regulation 460 has any application to the said sale.

For further answer and by way of affirmative defense, this defendant alleges that:

I.

The State of Washington is the owner in trust for school purposes of section 36, township 36 north, range 5 east W. M., situated in Skagit County, Washington, having acquired said section under section 10 of the Enabling Act (25 Stat. L. 676), and has been in ownership of said section continuously since such acquisition. [18]

II.

On September 15, 1943, the Western Log and Lumber Administrator of the War Production Board issued a directive to the defendant ordering that the timber on the south half of said section 36 be immediately made available for sale. Defendant thereafter determined that all timber on said section 36 should be offered for sale and accordingly offered said timber for sale at public auction, as provided by Article XVI, section 2, of the State Constitution.

III.

The sale was held on November 23, 1943. Two bidders participated in the bidding, making alternating competitive bids until defendant Soundview Pulp Company made the highest bid in the sum of eighty-six thousand three hundred thirty-six dollars and thirty-nine cents (\$86,336.39).

IV.

On November 23, 1943, defendant advised the Seattle office of the Price Administrator that said sale had resulted in a bid in excess of the ceiling price as computed under Maximum Price Regulation 460 and requested suggestions as to a proper course of procedure. The officials of said Seattle office advised defendant that the sale could not be completed for an amount in excess of seventy-seven thousand eight hundred fifty-three dollars and twenty-five cents (\$77,853.25), the maximum price computed under the terms of Maximum Price Regulation 460, and likewise notified Soundview Pulp Company that their bid was in excess of the maximum ceiling price and that if said sale were consummated on said bid, the Price Administrator would hold the Soundview Pulp Company responsible for violation of the Emergency Price Control Act of 1942, Executive Order No. 9250, and Maximum Price Regulation 460.

V.

Defendant thereupon informed the Seattle office of the Price [19] Administrator and both bidders at the sale that he had been advised and believed that Maximum Price Regulation 460 was not applicable to sales made by defendant of state owned timber and in particular was not applicable to the sale of timber on said section 36 and that the laws of the State of Washington compelled him to confirm the sale, at the expiration of the statutory period, in Soundview Pulp Company and issue to that company a bill of sale for said timber.

VI.

On December 1, 1943, Soundview Pulp Company filed an action in the Superior Court for the State of Washington for Thurston County praying for an injunction prohibiting defendant from confirming the sale or issuing a bill of sale to the timber until the legality of their bid could be determined and asking for a declaratory judgment of the rights, status and legal relations between the parties.

On December 4, 1943, Coos Bay Pulp Corporation, the other bidder at said sale, likewise commenced an action in said Superior Court praying for a writ of mandate to compel defendant to confirm the sale in Coos Bay and issue to that corporation a bill of sale to the timber.

On December 6, 1943, Coos Bay Pulp Corporation filed a third action in said Superior Court praying for an injunction to prohibit defendant from confirming the sale or issuing a bill of sale to Soundview.

Plaintiff was served with the pleadings in said cases, which were consolidated for trial, was given an opportunity to intervene therein but did not intervene, although plaintiff did appear as *amicus curiae*, submit oral argument and written briefs.

The judgment of the lower court was appealed to the Supreme Court of the State of Washington and upon said appeal plaintiff likewise appeared as *amicus curiae*, submitted oral argument and written briefs. Said Supreme Court in due course on July 22, 1944, rendered [20] its opinion which is reported in Volume 121, No. 6, Washington Decisions, page

242, in which it was held that the Emergency Price Control Act of 1942 was not applicable to the sale in question or to any other sales of timber made by defendant on behalf of the State of Washington in the performance of his governmental functions.

VII.

Defendant was about to complete said sale to the highest bidder in accordance with the determination and construction of the Emergency Price Control Act as announced by the State Supreme Court in said opinion, but in deference to the temporary restraining order issued out of this court in this cause defendant has thus far refrained from completing the aforesaid sale to the highest bidder in accordance with the state constitutional requirements as adjudicated and determined by the Supreme Court of the State of Washington in said opinion.

VIII.

In addition to said sale of November 23, 1943, at which Soundview Pulp Company was the highest bidder, defendant has offered four other tracts of timber for sale on which he has received bids in excess of the ceiling price as computed under Maximum Price Regulation 460. Said other sales are as follows:

Description	Date	Highest Bidder	Ceiling Price	Bid Price
Section 16 Township 20 North, Range 7 East W.M.	June 6, 1944	Rudy Malaenik	\$ 9,978.50	\$ 10,600.00
Section 19, Township 34 North, Range 39 East W. M.	June 6, 1944	Roy Gotham	\$ 3,150.65	\$ 4,102.00
Section 24, Township 19 North, Range 9 East W.M.	May 14, 1944	White River Lumber Co.	\$ 14,533.09	\$ 16,166.80
Section 26, Township 19 North, Range 9 East W.M.	May 14, 1944	White River Lumber Co.	\$103,437.50	\$116,484.10

[21]

IX.

None of said sales has been completed, nor has defendant completed any sales in excess of the Office of Price Administration ceiling prices for the reason that defendant does not want to violate the rules and regulations of the Office of Price Administration unless it be judicially determined by a court of competent jurisdiction that defendant is not subject to the maximum ceiling prices of plaintiff. Completion of said sales, other than the sale at which Soundview Pulp Company was the highest bidder, has been voluntarily withheld by defendant although no restraining order or injunction has been issued by any court restraining completion of said sales until the temporary restraining order was issued in this case.

For a second affirmative defense, defendant alleges that the Emergency Price Control Act of 1942 does not by its terms or intendment apply to sales made by a sovereign state in the performance of its governmental functions, for the reason that said act does not purport to include such sales and that if the act so intended then the act violates the Fifth and Tenth Amendments to the Constitution of the United States.

For a third affirmative defense, defendant alleges that the Emergency Price Control Act of 1942 provides "that no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency." And the plaintiff herein is seeking to enjoin Jack Taylor, acting in his official capacity as Land Commissioner of the State of Washington, and that said plaintiff is thereby seeking a remedy against the said defendant which, by the terms of the act itself, has been denied plaintiff. [22]

Wherefore, defendant, having fully answered, prays that the restraining order be dissolved and that plaintiff's application for preliminary and final injunction be denied, and for such other relief as may be proper in the premises.

/s/ SMITH TROY

Attorney General

/s/ R. A. MOEN

Assistant Attorney General

Attorneys for defendant Jack Taylor, as Commissioner of Public Lands of the State of Washington.

State of Washington
County of Thurston—ss.

R. A. Moen, being first duly sworn, on oath deposes and says:

That he is a duly appointed, qualified and acting Assistant Attorney General of the State of Washington; that he has read the foregoing answer, knows the contents thereof, and that the statements and allegations therein made are true.

/s/ R. A. MOEN

Subscribed and sworn to before me this 7th day of August, 1944.

[Seal] /s/ JENNIE M. TATTERSALL

Notary Public in and for the State of Washington,
residing at Olympia.

My commission expires November 25, 1947.

[Endorsed]: Filed Aug. 8, 1944. [23]

[Title of District Court and Cause.]

ANSWER OF THE SOUNDVIEW PULP
COMPANY

Comes now the Sound View Pulp Company, one of the defendants above named, and for answer to the complaint of the plaintiff alleges:

I.

Answering Paragraph I of said complaint, the defendant is in doubt as to whether the cited statute or any other statute confers jurisdiction of this

court upon this case and, therefore, denies each allegation therein contained.

II.

The defendant admits each of the allegations contained in Paragraph II of the complaint.

III.

Answering Paragraph III of the complaint, this defendant is in doubt as to whether or not. Section 205(a) of the act entitles the plaintiff to injunction relief against the defendant in this action and, therefore, denies each allegation therein contained.

IV.

This defendant admits each allegation contained in [24] Paragraph IV of the complaint.

V.

Answering Paragraph V of the complaint, this defendant admits that on November 23, 1943, it bid the sum of \$86,336.39 for timber located on Section 36, Township 36 North, Range 5 East, W.M., Skagit County, Washington, offered for sale by the defendant, Jack Taylor, in his official capacity and transmitted said sum to the defendant, Jack Taylor, and that on November 26, 1943, Jack Taylor notified this defendant that its said bid was the highest and best bid made at said sale and that the defendant, Jack Taylor, now threatens to complete said sale and deliver to this defendant an appropriate bill of sale to the timber and that the sum of \$86,336.39 exceeds the maximum price for

the timber as established by Maximum Price Regulation 460, but is in doubt as to whether said practices and acts constitute a violation of the Emergency Price Control Act of 1942 or Maximum Price Regulation 460 and, therefore, denies each and every other allegation in said paragraph.

For further answer, this defendant alleges as follows:

I.

The Soundview Pulp Company is a corporation organized and existing under the laws of the State of Washington and has complied with all of the laws of said state, including the payment of its last annual license fee.

II.

That the plaintiff, Chester Bowles, and the defendant, Jack Taylor, hold the offices and are acting in the capacities as set forth in Paragraph II of the plaintiff's complaint.

III.

That the defendant, Jack Taylor, as Commissioner of Public Lands of the State of Washington, offered for sale the timber on Section 36 Township 36 North, Range 5 East, W.M., [25] situated in Skagit County, at public auction to the highest bidder on November 23, 1943; that the defendant, the Soundview Pulp Company, appeared at said sale and offered to buy the said timber for \$77,853.25 but was advised by the county auditor of Skagit County conducting said sale on behalf of the

defendant, Jack Taylor, that the bidding at the said sale must continue and the property would be sold to the highest bidder, irrespective of the application of Maximum Price Regulation 460, solely on account of the instructions of the defendant, Jack Taylor, regulating the bidding at said sale and over the protest of this defendant and the defendant made the highest bid at said sale, the sum of \$86,336.39, and the defendant was advised by the defendant, Jack Taylor, that he intended to confirm the said sale at said price to the defendant, Soundview Pulp Company; that immediately following the said sale, this defendant conferred with the Seattle Office of Price Administration and was advised on November 26, 1943, by the Seattle Office of the Price Administrator, that the bid was considered in excess of the ceiling price for timber as provided under Maximum Price Administration 460 and was further advised that if the sale was consummated on said bid, the price administrator would hold this defendant responsible for violation of the Emergency Price Control Act of 1942.

That under the statutes of the State of Washington, if the sale was confirmed before the legality of the defendant's bid could be determined, the purchase money tendered by the plaintiff to the defendant, Jack Taylor, would be paid into the state treasury for the school fund and could not be withdrawn or returned to the plaintiff if the sale was found to be in violation of law without an appropriation of the legislature of the State of Washing-

ton, which appropriation would rest in the sound discretion of said legislative body. [26]

This defendant being without adequate remedy at law, in an endeavor to secure a determination and declaration of its rights, status and legal relations with the State of Washington, filed an action in the Superior Court of Thurston County, entitled Soundview Pulp Company, a corporation, Plaintiff, v. Jack Taylor, Commissioner of Public Lands of the State of Washington, Defendant, Cause No. 20703, and secured temporary restraining order against the confirmation of said sale and this defendant caused a certified copy of the complaint and a temporary restraining order properly certified, to be delivered to the Price Administrator so that the Price Administrator might intervene in said action.

That said action in said Superior Court of Thurston County was heard and determined, the Price Administrator appearing only as amicus curiae at the hearing thereof and the said action resulted in a judgment, that this defendant's action be dismissed and the moneys paid by it to the defendant, Jack Taylor, to-wit, \$86,336.39, be returned to this defendant.

That the defendant, Jack Taylor, appealed the said judgment to the Supreme Court of the State of Washington and on said appeal the plaintiff appeared as amicus curiae, submitted oral argument and brief and the Supreme Court of the State of Washington on July 22, 1944, rendered its opinion reversed the judgment appealed from and

directed the Superior Court of Thurston County to enter its judgment in accordance with said opinion.

That in view of the present action the plaintiff is still in doubt as to its rights, status and legal relations with the State of Washington and the United States Government as they are affected by the constitution and statutes of the State of Washington and the statutes, orders and regulations of the United States and desire only to act in a legal manner as a court [27] of competent jurisdiction shall declare those rights.

Wherefore, this defendant prays that this court determine its jurisdiction of the subject matter and the persons who are parties hereto; that the preliminary injunction issued in this cause be continued in force and effect until the jurisdiction of this court is determined and the said cause heard on the merits and that upon final hearing thereof, if it be determined that the proposed sale is in violation of any law as claimed by the plaintiff herein; that a permanent injunction be entered restraining said sale and directing the defendant, Jack Taylor, to return to this defendant, the tendered purchase price of \$86,330.39, but if it be determined that said sale is a lawful sale, that the said action be dismissed and that this defendant have any other relief that may be meet and proper in the premises.

KERR, McCORD & CAREY

Attorneys for Southview

Pulp Company

United States of America
Western District of Washington—ss.

W. Z. Kerr, being first duly sworn an oath, deposes and says:

That he is the attorney for and assistant secretary of the Southview Pulp Company, one of the defendants in the above entitled action; that he is authorized to make this verification; that he has read the foregoing answer, knows the contents thereof and the allegations therein are true except as stated to be made on information and belief.

W. Z. KERR

Subscribed and sworn to before me this 9th day of August, 1944.

S. N. GREENLEAF

Notary Public in and for the state of Washington,
residing at Seattle.

Due service acknowledged Aug. 9, 1944.

GEO. W. LAYMAN

Atty for Plaintiff.

[Endorsed]: Filed Aug. 11, 1944. [28]

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes Now plaintiff above named and moves as follows against the answer filed herein by defendant Jack Taylor:

I.

Plaintiff moves to strike the first affirmative defense set forth in said answer on the ground that the facts therein stated are immaterial, and do not constitute a defense to plaintiff's complaint.

II.

Plaintiff moves to stike the second affirmative defense set forth in said answer on the ground that the allegations contained therein are merely conclusions of law and that they do not constitute a defense to plaintiff's complaint.

III.

Plaintiff moves to strike the third affirmative defense set forth in said answer on the ground that the facts alleged therein are immaterial and that they do not constitute a defense to plaintiff's complaint. [29]

This motion is based upon the files and records herein.

FLEMING JAMES, JR.

Director, Litigation Division

ABRAHAM GLASSER

Special Appellate Attorney

GEORGE H. LAYMAN

District Enforcement

Attorney

C. E. HUGHES

Litigation Attorney

Attorneys for Plaintiff.

Copy received Aug. 11, 1944.

/s/ R. A. MOEN,

Atty. for def. Jack Taylor.

Copy received Aug. 11, 1944.

/s/ KERR, McCORD & CAREY

Atty for Soundview Pulp Co.

[Endorsed]: Filed Aug. 11, 1944. [30]

In the United States District Court, Western
District of Washington, Southern Division

RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 11th day of August, 1944, the Honorable Charles H. Leavy, U.S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said Court, to-wit:

[Title of Cause.]

No. 649

Now, on this 11th day of August, 1944, this cause comes on before the Court for hearing on application for preliminary injunction. At 10 A.M. the case is called and the Court informs counsel for the defendant that Mr. Layman and Mr. Glasser have been delayed and the case is continued to 1:30 P.M. At 1:50 P.M. Court is again in session.

George Layman and Abraham Glasser represent

the plaintiff and R. A. Moen represents defendant Jack Taylor and William Z. Kerr represents defendant Soundview Pulp Company. Mr. Layman files motion to strike.

The Court now denies the right of defendant to a three-judge Court and exception is allowed defendant. The Court denies exception of defendant to right of O.P.A. attorney to appear without attorney general. Exception allowed defendant. [31]

Argument for plaintiff by Mr. Glasser.

At 2:55 Court recessed 15 minutes. At 3:20 Court is again in session. Argument for defendant by Mr. Moen. Remarks by Mr. Kerr. Rebuttal argument by Mr. Glasser. The Court now holds that the act is constitutional and the regulations are valid, but as the act applies to the instant case this construction does not apply and the Court denies plaintiff injunctive relief and denies application for preliminary injunction. Dismisses the action as to the Soundview Pulp Company. Written order to be presented later. By stipulation of counsel, in the sale of timber, the situation is to remain in status quo pending an appeal from the Court's decision. Plaintiff now requests that Findings of Fact and Conclusions of Law be submitted, and the Court sets Monday, August 21, at 2 P.M. as the date for submission.

United States District Court, Western District
of Washington, Southern Division

RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 21st day of August, 1944, the Hon. Charles H. Leavy, U.S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

No. 649

Now on this 21st day of August, 1944, this cause comes on before the court for presentation of findings of fact and conclusions of law. George H. Layman represents the plaintiff and R. A. Moen represents defendant Jack Taylor, and William Z. Kerr represents the Puget Sound Mill Company. Mr. Layman states to the court that formal findings of fact and conclusions of law will not be presented. Judgment is presented and signed by the court and filed.

At 2:45 Court adjourned. [33]

In the District Court of the United States for the
Western District of Washington
Southern Division

No. 649

CHESTER BOWLES, Administrator ~~Office~~ of
Price Administration,

Plaintiff,

vs.

JACK TAYLOR, as Commissioner of Public Lands
of the State of Washington, and **SOUTH-
VIEW PULP COMPANY**, a Washington
Corporation,

Defendants.

JUDGMENT

This matter coming on for hearing on August 4, 1944, on plaintiff's motion for preliminary injunction and on order to show cause why a preliminary injunction should not issue, plaintiff being represented by its attorneys, Abraham Glasser and George H. Layman, defendant Soundview Pulp Company appearing by its attorney, W. Z. Kerr, and defendant Jack Taylor appearing by his attorney, R. A. Moen, Assistant Attorney-General of the State of Washington, and this cause being continued until August 11, 1944, for full hearing on said motion, on plaintiff's motions to strike, and of this cause on the merits, at which time all issues herein were submitted to the court, and the court having heard oral arguments of counsel and

having considered written briefs submitted herein;
and

1. There being no dispute as to any material issue of fact between the parties herein as indicated by stipulation in open court, and

2. The court being of the opinion that the jurisdiction of this court is properly invoked by plaintiff under Sections 205(a) and 205(c) of the Emergency Price Control Act of 1942, as amended, and that said jurisdiction is not barred by the provisions of 28 USC 341 or 28 USC 380, or by the fact that the suit was instituted by the Price Administrator without the approval of the Department of Justice; and

3. The court being of the opinion that Sections 2(a), 302(c) and 302(h) of the Emergency Price Control Act of 1942, as amended, should be [34] and they are hereby construed as not comprehending within their grant of authority to the Price Administrator any authority to set maximum prices for sales of school-land timber by the State of Washington made in its sovereign and governmental capacity; and

4. The parties having stipulated in open court that the defendants shall not take further steps toward completion of the timber transactions described in the complaint pending determination of appeal and subsequent entry of final judgment in this cause; and

5. The court having heretofore rendered an oral decision and being of the opinion that the temporary restraining order should be dissolved, and the

applications for injunction denied, Now Therefore,

It Is Hereby Ordered that defendant Jack Taylor's motion to convene a three judge court and his motion to dismiss this action on jurisdictional grounds be, and they are hereby, denied; and.

It Is Further Ordered That plaintiff's motions to strike the three affirmative defenses contained in the answer filed by defendant Jack Taylor, be, and they are hereby denied; and

It Is Further Ordered, Adjudged and Decreed that the temporary restraining order entered herein be and is hereby dissolved, that the motion for a preliminary injunction be and it is hereby denied, and that the complaint be and it is hereby dismissed; and

It Is Further Ordered that defendants shall not take further steps toward completion of the timber transactions described in the complaint during the time for taking an appeal, and pending the determination thereof, and the subsequent entry of final judgment in this cause, provided that notice of appeal is filed by plaintiff within 30 days from this date; and

It Is Further Ordered that no party shall recover costs herein, and exceptions allowed to all parties. [35]

Done in open court this 21st day of August, 1944.

CHARLES H. LEAVY

District Judge

Presented and approved as to form by:

GEORGE H. LAYMAN

of Attorneys for Plaintiff

Approved as to form:

KERR, McCORD &

CAREY & W. Z. KERR

Attorneys for defendant,

Soundview Pulp Company

R. A. MOEN

Attorney for defendant, Jack
Taylor.

[Endorsed]: Filed Aug. 21, 1944. [36]

[Title of District Court and Cause.

NOTICE OF APPEAL

Notice Is Hereby Given that Chester Bowles, administrator, Office of Price Administration, the above named plaintiff, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of dismissal entered in this action on August 21, 1944, recorded in Civil Order Book No. 8, Page 886, in the office of the clerk of the above entitled court.

Dated: September 13, 1944.

THOMAS I. EMERSON

Deputy Administrator

FLEMING JAMES, JR.

Director, Litigation Division

ABRAHAM GLASSER

Special Appellate Attorney

W. DUNLAP CANNON, JR.

Regional Litigation Attorney

GEORGE H. LAYMAN

District Enforcement

Attorney.

Attorneys for Appellant.

Address: Office of Price Administration, 3337
White-Henry-Stuart Bldg., Seattle, 1, Washington.

Copy of the within Notice of Appeal mailed to
R. A. Moen, Asst. Attorney General, State of Wash-
ington, at Olympia, Washington, and to Kerr, Mc-
Cord & Carey, Hoge Building, Seattle, Washington,
this 14th day of September, 1944. E. Redmayne,
Deputy Clerk.

[Endorsed]: Filed Sept. 14, 1944. [37]

[Title of District Court and Cause.]

MOTION

Comes now the above named plaintiff and moves
the court for an order extending the time until
November 10, 1944, within which to file the record
on appeal and to docket this action in the appellate
court.

This motion is based upon the affidavit of George H. Layman, attached hereto and made a part hereof.

GEORGE H. LAYMAN
of Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 6, 1944. [38]

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington
County of King—ss.

I, George H. Layman, being first duly sworn on oath say:

That I am one of the attorneys for plaintiff in the above action, and am familiar with the facts in connection with the proceedings herein.

That judgment was entered herein on August 21, 1944, after court appearances on August 4 and August 11, 1944; that notice of appeal to the Circuit Court of Appeals for the Ninth Circuit was filed herein on September 14, 1944; that Rule 73(g), Rules of Civil Procedure for the District Courts of the United States, provides that the record on appeal shall be filed with the appellate court, and the action docketed therein, within forty days from the date of the notice of appeal; that in designating the contents of record on appeal, it is necessary that plaintiff first receive the reporter's transcript of proceedings in this court; and that to date the reporter has been unable to supply to plaintiff

such transcript, although it is now being prepared.

That I expect to receive the transcript on or about October 10, 1944, but must thereafter forward it for consideration to our regional office at San Francisco and our national office at Washington, D. C.; and that it will be impracticable to complete the steps necessary in preparing the record on [39] appeal within the forty day period from September 14, 1944.

This affidavit is made in support of plaintiff's motion for an extension of time until November 10, 1944, within which to file the record on appeal and docket the action in the appellate court; but plaintiff agrees to expedite the appeal, and to file the record as quickly as possible after receipt of transcript from the official court reporter.

[Seal] GEORGE H. LAYMAN

Subscribed and sworn to before me this 5th day of October, 1944.

PATRICK A. GERAGHTY

Notary Public in and for the state of Washington
residing at Seattle.

[Endorsed]: Filed Oct. 6, 1944. [40]

[Title of District Court and Cause.]

ORDER

This matter coming on before the court upon the motion of plaintiff, appearing by George H. Layman, one of his attorneys, for an order extending the time within which to file the record on appeal

and to docket this action in the Circuit Court of Appeals for the Ninth Circuit; and

It appearing to the court that there is good reason for this extension because of the fact that the official court reporter has been unable to supply transcript of the proceedings herein, conducted on August 4 and August 11, 1944; now, therefore,

It Is Hereby Ordered that the time for filing the record on appeal and docketing this action in the said appellate court be, and it is hereby, extended to November 10, 1944.

Done in open court this 6th day of October, 1944.

CHARLES H. LEAVY

District Judge

[Endorsed]: Filed Oct. 6, 1944. [41]

[Title of District Court and Cause.]

**STIPULATION FOR DESIGNATION OF
RECORD.**

It is hereby stipulated and agreed by and between the above named plaintiff and the above named defendants, acting through their respective attorneys of record, that the following portions of Record and Proceedings are hereby designated to be included in the Record on Appeal in this action:

1. Complaint.
2. Motion for Temporary Restraining Order, Preliminary Injunction, and Order to Show Cause.
3. Affidavit in support of Motion for Order to

Show Cause, and for Temporary Restraining Order.

4. Temporary Restraining Order and Order to Show Cause, dated July 28, 1944.

5. Motion to Convene Three Judge Court.

6. Motion to Dismiss and to Dissolve Temporary Restraining Order.

7. Answer of Defendant, Jack Taylor.

8. Answer of Soundview Pulp Company.

9. Motion to Strike.

10. Judgment, dated August 21, 1944. [42]

11. Notice of Appeal, dated September 13, 1944.

12. Motion for Extension of Time to file Record on Appeal.

13. Affidavit in support of Motion to Extend Time to file Record on Appeal.

14. Order extending time for filing record on appeal, dated October 6, 1944.

15. Complete Record of Minute Entries in District Court Docket.

16. Statement of Points.

17. Portions from transcript of Proceedings, as follows:

Page 1—Entire page.

Page 2—Lines 1 through 6, closing with words "this matter".

Page 3—Lines 15 through 28, closing with words "grant the continuance".

Page 5—Lines 3 through 7, closing with the words "dispute on the facts".

Page 13—Lines 23 through 27, inclusive.

Page 14—Lines 5 through 16, closing with word "yesterday".

Page 18—Entire page.

Page 19—Line 26, the words "The Court:".

Page 20—Lines 7 through 21, inclusive.

Page 21—Line 15, the words "The Court:", Lines 18 through 30, inclusive.

Page 22—Entire page.

Page 23—Lines 1 through 7, inclusive.

Page 67 to 72, inclusive, entire pages.

Page 73—Lines 1 through 26, inclusive.

Page 74—Lines 6 through 25, inclusive. [43]

18. Stipulation for Designation of Record.

Dated this 30th day of October, 1944.

GEORGE H. LAYMAN

Of Attorneys for Plaintiff

R. A. MOEN

Assistant Attorney-General—One of the attorneys for Defendant, Jack Taylor, as Commissioner of Public Lands of the State of Washington.

KERR McCORD & CAREY

W. Z. KERR

Attorneys for Defendant,

Soundview Pulp Company

[Endorsed]: Filed Nov. 1, 1944. [44]

[Title of District Court and Cause.]

STATEMENT OF POINTS

Plaintiff proposes on its appeal to the Circuit Court of Appeals for the Ninth Circuit to rely upon the following points:

1. The question considered and decided by the District Court, to-wit:

Whether the Emergency Price Control Act of 1942, is to be construed as applying to the State-owned school land timber here involved, was one which the District Court was without jurisdiction or power to consider or decide in view of the provisions of Section 204(d) of the Act.

2. The District Court exceeded its jurisdiction and power in making the determination that the Emergency Price Control Act of 1942 does not apply to the State-owned school land timber here involved, inasmuch as this determination amounted to a determination that MPR 460, which explicitly applies to state-owned standing timber, is invalid as tested by the limits of the Price Ad- [45] ministrator's statutory authority.

3. The district court erred in dismissing the complaint.

Dated the 30th day of October, 1944.

THOMAS I. EMERSON

Deputy Administrator

FLEMING JAMES, JR.

Director, Litigation Division

ABRAHAM GLASSER

Special Appellate Attorney

W. DUNLAP CANNON, JR.

Regional Litigation Attorney

GEORGE H. LAYMAN

District Enforcement Attorney

Attorneys for Plaintiff

Service accepted October 30, 1944.

R. A. MOEN

Atty. for def. Jack Taylor

Service accepted 10/31/44.

KERR, McCORD & CAREY

By W. Z. KERR

Atty. for Soundview Pulp Co.

[Endorsed]: Filed Nov. 1, 1944. [46]

[Title of District Court and Cause]

CLERK'S CERTIFICATE

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript of the Record on Appeal, consisting of pages numbered 1 to 46, inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in Cause No. 649, Chester Bowles, Administrator, Office of Price Administration, Plaintiff-Appellant, vs. Jack Taylor, as Commissioner of Public Lands of the State of Washington, and Soundview Pulp Company, a Washington corporation, Defendant-Appellees, as required by the Stipulation for the Designation of the Record, on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Judgment of the United States District Court for the Western District of Washington, Southern Di-

vision, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the original Reporter's Transcript of the Proceedings of August 4, 1944 and August 11, 1944, consisting of pages numbered 1 to 75, inclusive, are herewith transmitted to the Circuit Court of Appeals for the Ninth Circuit:

[47]

I do further certify that the following is a full, true and correct statement of all fees and charges earned by me in the preparation and certification of the aforesaid Transcript of the Record on Appeal, to-wit:

Appeal fee	\$ 5.00
Clerk's fee for comparing 120 folios	
@ 5c per folio, and certificate	
thereto	6.50
	<hr/>
	\$11.50

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 7th day of November, 1944.

[Seal] JUDSON W. SHORETT,

Clerk

By E. E. REDMAYNE,

Deputy. [48]

[Title of District Court and Cause]

PROCEEDINGS

Be It Remembered that on the 4th day of August, 1944, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States for the Western District of Washington, Southern Division, at Tacoma, Pierce County, Washington; the plaintiff appearing by his attorneys, George H. Layman and Abraham Glasser, the defendant Jack Taylor, as Commissioner of Public Lands of the State of Washington appearing by his attorney R. A. Moen, Assistant Attorney General of the State of Washington, and the defendant Soundview Pulp Company appearing by its attorneys Messrs. Kerr, McCord & Carey (by Mr. Kerr).

Whereupon, the following proceedings were had and done, to-wit:

The Court: Docket 649, Chester Bowles, Administrator, Office of Price Administration, versus Jack Taylor, Commissioner of Public Lands, and Soundview Pulp Company. [1*] This is the time set for the hearing on this preliminary injunction proceeding here about a week ago. Are the parties ready now?

Mr. Layman: Yes, Your Honor.

Mr. Moen: Your Honor, I would like to ask the Court for a continuance on this matter. [2]

* Page numbering appearing at foot of page of original Reporter's Transcript.

Mr. Layman: We would not wish to resist the continuance, because we do not want to rush the defendants into presenting any they wish to present to the Court. However, I would like to have a stipulation on record by all attorneys in the case that the temporary restraining order may continue in effect until the hearing, and until the further order of the Court.

Mr. Moen: I am willing to so stipulate.

Mr. Kerr: I would be glad to so stipulate.

The Court: Then, it will be the order of the Court, based upon the oral stipulation made in open court, that a temporary restraining order remain in force and effect until the matter is heard for a permanent injunction. I am going to grant the continuance. [3]

The Court: Personally, I can see nothing to be gained by a pre-trial conference in a matter of this kind. The facts are practically not in dispute at all.

Mr. Moen: That is correct, Your Honor, I do not think there is any dispute on the facts. [5]

The Court: Now what other position do you have?

Mr. Moen: Those are the only two important ones that I wanted to take advantage of. I was somewhat worried about serving us. I did not want to take advantage of it. I wanted the Court to be satisfied it was proper service. [13]

I am satisfied with the service if the Court is, but I wanted to call it to the Court's attention so you would not raise it on your own motion.

The Court: The Court is satisfied, particularly if there is no contention going to be made. The Commissioner appears and does not challenge the Court's jurisdiction.

Mr. Moen: I am not challenging. Likewise, with the right of these attorneys to bring the action. That is another technical matter which I do not want to urge, but I might call Your Honor's attention to two authorities which came to my attention yesterday. [14]

[Title of District Court and Cause.]

• PROCEEDINGS

Be It Remembered that on the 11th day of August, 1944, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States for the Western District of Washington, Southern Division, at Tacoma, Pierce County, Washington; the plaintiff appearing by his attorneys, George H. Layman and Abraham Glasser, the defendant Jack Taylor, as Commissioner of Public Lands of the State of Washington appearing by his attorney R. A. Moen, Assistant Attorney General of the State of Washington, and the defendant Soundview Pulp Company appearing by its attorneys Messrs. Kerr, McCord & Carey (by Mr. Kerr).

Whereupon, the following proceedings were had and done, to-wit: [18]

The Court: As to the facts, here, I assume there is no dispute, and no desire upon the part of any of the parties to offer any oral proof.

Mr. Moen: Not so far as we are concerned. We will admit all the facts in the Complaint, except we deny the legal effect of some of them, but that is purely a legal argument, and we haven't any oral testimony to offer.

Mr. Glasser: There are facts contained in the Answer whose correctness we also admit, although we do not concede they constitute a legal defense to the action. There is no dispute in the facts, in other words.

● The Court: That is my impression of it after an examination of the pleadings, and likewise of the briefs that have been submitted. [20]

The Court: I think that I might expedite this matter substantially by making a disposition of some of the preliminary jurisdictional questions that have been raised by the defendant. One is a challenge to the jurisdiction of this Court based upon the ground that this is an action that should be heard by a three-judge court, rather than by a District Court—a three-judge court such as is provided for in the Judicial Code—I think it is Section 266 of the Code, and in respect to that, I have no hesitancy in summarily holding against the contention,—

Mr. Moen: May we have an exception?

The Court: And allow you an exception. For

the purpose of the record, I will state that all parties will [21] be allowed exceptions to all adverse rulings, whether they save them or not.

As to the other challenge, concerning the right of counsel for the Price Administration to appear here without having associated with him the United States Attorney, on that I shall likewise rule against the contention of the defendant, and allow you an exception, and that, then, will bring your argument down to the legal issue raised as to this relief that you seek under the Act as Congress enacted it, and I assume that the amendments that have been made to it, when it was extended are not—I haven't had an opportunity to examine them carefully, but you do not contend that any one of those apply to the situation we have here?

Mr. Glaser: The amendments are not applicable, unless the State desires to file a protest in the statutory form, whereby certain procedural changes have been made, but apart from that, the amendments, I think, are not applicable in this case.

The Court: Very well, with that statement you may proceed.

Mr. Glaser: Am I to understand you have disposed of the contention this case should have been brought in the Supreme Court of the United States, on the grounds there was original and exclusive jurisdiction in that court? Does Your Honor's remark about the three-judge court point, conclude the defendant's contention about bringing the case to the Supreme Court of the United States—

The Court: They do. They—

Mr. Glasser: We do not feel there is a distinction— [22]

The Court: I do not feel they are of sufficient gravity to justify the Court in ruling here, in making any distinction.

Mr. Moen: I would like an exception to that ruling.

The Court: Yes, exception allowed. [23]

COURT'S ORAL DECISION

The Court: I might state that there are many aspects of this controversy that would seem to justify, and perhaps warrant, the Court in taking further time in deliberation and consideration, and rendering a more formal written memorandum than would be by an oral pronouncement at this state of the litigation, but since the case first was brought to my attention I have been on semi-vacation but have spent much of my time giving consideration to the authorities cited, and independent research as well, and I feel that I am as well prepared to make a disposition of this matter now, rather summarily, as I would be if I spent another week or two on it. As I announced during the progress of the argument earlier, I am inclined to believe that whatever my conclusion is, it will be appealed and probably should be, because the question is one that is fraught with difficulties of solution, as evidenced by the decision of the nine able judges of the court of last resort of this state.

I have no hesitancy at all in agreeing with argument of counsel for the plaintiff that Congress

clearly intended that the Federal District Courts as well as the other courts are deprived of jurisdiction of the regulations; and I grant they are not within the jurisdiction of this court.

The great difficulty, however, that arises in this case is the difficulty of giving application to that language in the Act in view of the fact that the Congress in enacting this law, specifically gave the District Courts [67] the right to entertain a proceeding such as we have here, and in order to judicially determine the legal issues here involved, we must give consideration to the Act as a whole. I am satisfied Congress never intended when they conferred the power upon the District Courts with reference to injunction, to deprive them of giving consideration to a construction of the Act, and if a construction of the Act affects ultimately adversely or otherwise, a regulation thereunder, that is a condition that can not be avoided, because it would be a most unusual situation where a court was called upon to exercise jurisdiction in a matter by use of an extraordinary remedy like that of injunction, and then deny it the right to interpret the Act upon which the remedy rested.

I have no hesitancy in holding that the Act is constitutional and well within the power of Congress to enact, and I assume for all purposes, in the conclusion that I have arrived at, that the regulations are valid. I am not concerning myself with the regulations but rather with an interpretation of the language of the Act as it applies to the particular situation presented in the instant case.

The Emergency War Act was passed by the Congress, as the debates indicate and as the Committee Reports likewise establish, with considerable concern as to how far-reaching it might be, and safeguards were sought to be written into it. It is an Act that is shot through with exceptions, and then a definite date set upon which it should come to an end unless extended by Act of Congress, which has since been done, all of which evidences to this Court the fact that it was an absolutely essential Act in [68] a period of crises but one that was not to be construed beyond the need that brought it into being.

I have no criticism at all of O.P.A. and the various regulations that they have enacted, and I can not of course, in deciding this issue concern myself judicially with a pronouncement that they have done a splendid job or a poor job. All of us as good Americans realize that war brings hardships, and they fall heavier on some than they do on others, and that is both on the matter of finances and of property, and of life itself, but the difficult question to me in this hearing is to determine what was intended to be included by the Act itself. I want to say to counsel who represented the plaintiff, you have presented very forceful and splendid arguments—your brief was just given to me today. I have hurried through it. It is persuasive from your viewpoint. Still the big question that looms in this case—and it can not be sidestepped, is the question as pointed out by the Supreme Court of this State, in both the majority and the mi-

nority opinions is whether a sovereign state is included in the Act. It is true that the minority opinion by Judge Blake gives a much more comprehensive application to war power than perhaps some of the other opinions. The conclusion arrived at by the majority decision is binding upon this Court, in so far as it construes the State Constitution and the State Laws, and it is certainly binding upon the defendant Taylor, who is here only as a representative of the State of Washington. Consequently, we bring ourselves down to a conflict—for the moment eliminating the other defendant Soundview Pulp Company—we bring ourselves down to a conflict between the two [69] sovereignties, one that has vexed minds far more brilliant than mine, and one upon which grave differences of opinion have arisen, which have resulted in learned discussions, and many, many decisions.

But rapidly passing along, the final responsibility resting upon every American citizen and certainly upon the courts, whether it be in war time or in peace time, is to do everything that is consistent with the preservation of the Union as a whole, and with the preservation of the forty-eight states that are separate sovereignties in their particular spheres.

Now in the instant case we have what? We have the public school system of the State of Washington being challenged, in a manner. This state was blessed by nature with a large acreage of splendid merchantable timber, and the Congress said to the inhabitants of the Territory before it became

a state, "You may become a state by adopting", among other things, "a Constitution, whereby you will accept certain grants of land, but you must agree that when you make a disposition of them, you will dispose of them at public sale", and then a Constitution was adopted which provided that the sale shall be at public auction to the highest bidder, and provided that the funds received should be separate and distinct, and an irreducible fund, and following the provisions of the Enabling Act, only the income of such a fund can be used to maintain the state school system. The result of all of this has been that the State of Washington has one of the finest school systems among the forty-eight states, with illiteracy, perhaps if not the lowest, very near the lowest of any of the forty-eight [70] states, with legislative enactment in the state providing that no one can exercise the right of franchise unless they can read and write the English language. In other words, the qualifications of the electorate in this state depends upon our public schools.

All of these things, therefore, go directly to the heart of the existence of the state government, and the question now is, did Congress mean, when they defined the word "person"—and that is the only place in the Act that we could possibly, in my judgment, rest a conclusion—that the state in the sale of its school lands, is covered by the regulation? Did Congress mean there to override this particular, and essential, and important State function of public education which they had required the

people of the Territory to adopt or consent to before they became a state, because, I say if you take out of the Act the definition of "person", you haven't anything left upon which you could say that this regulation applies to the State in the sale of the timber as here involved. No, the purpose—and I think I speak somewhat advisedly, of including governments and governmental agencies was to meet a condition that existed, in many forms throughout the nation involving the manufacture or the sale of liquor, of numerous other commodities—for instance we find some states engaged in the manufacture of cement, of flour, etc.—if this State saw fit to engage in the manufacture of lumber there is no question but this Act would apply. These are the many federal governmental agencies that were then in being and anticipated as coming into being, through governmental activities which were dealing directly in commodities. [71] They were intended to be covered. I can not bring myself to a conclusion that it was ever intended that this law should in any way, either weaken or arrest for a short time, essential State governmental functions. The conversion of this gift school lands from the Federal government to the State into money, and that into a permanent fund, the earnings of which become a major source of revenue supporting education in the State of Washington is a governmental function. I am resting my conclusion upon that basis, and I shall have to deny the plaintiff the relief that it seeks.

Coming now to the other defendant, the Sound-

view Pulp Company, at first blush it seemed to me there could be no question but that they would be subject to the provisions of this Act, because Congress said the buyer is just as liable as the seller. If in a situation such as we have here the Court should find that injunction is the remedy against the buyer, then the result of it would be to defeat the very thing that the Court has just found is an essential to the maintenance and conduct of the state government, and for that reason I am forced to the position of dismissing the action as to the second defendant, the Soundview Pulp Company.

I do not know that any Findings are necessary. If counsel on either side, or counsel for the plaintiff who might feel aggrieved at the Court's conclusion wants to submit Findings, the Court will give consideration to them. Otherwise, a decree may be submitted and exceptions will be allowed, and a basis made for an early appeal perfected.

Mr. Glasser: In order that the record may be clear—Your Honor's remarks are the equivalent of an [72] opinion, and in order that the record in that regard may be clear on what we consider to be an essential issue in the case, I wish to put the question to Your Honor, and I respectfully request that Your Honor will answer that question. Your Honor is aware I am certain, that the maximum price regulation 460 in terms, applies to the subject matter of this case.

The Court: I am, now.

Mr. Glasser: Your Honor then finds, are we

correct in this. Your Honor finds that the regulation is unauthorized under the statute? The regulation, in other words, is invalid, insofar as it attempts to touch the subject matter here involved?

The Court: I am not going to be, as I stated earlier in this argument, put in the position of passing upon the validity or invalidity of the regulations.

Mr. Glasser: You see, Your Honor's insistence in that regards places us—

The Court: I am resting my conclusion entirely upon the construction of the Act as Congress passed it, and more specifically upon the construction of the definition of the word "person", as found in the Act, and holding that that definition applies to government only when engaged in a commercial undertaking or venture, in a proprietary capacity, as we frequently use the term, and not when it deals with an essential government function. [73]

Mr. Glasser: The Price Administration would desire to take an appeal. In that connection, we want to inquire whether either of these two arrangements is possible: One that the parties will informally agree to maintain the status quo, or two, that Your Honor will grant an injunction pending our appeal?

Mr. Moen: I am perfectly willing to state in open court there is no—

The Court: I hesitate to grant an injunction, but I am willing to include in the decree—because the government is not required to post a

bond—therefore, I would be willing to include in the decree that the situation remain in status quo.

Mr. Moen: I am perfectly willing to state there is no need for it. We have been holding this for seven months now, and we will hold it further. There will be no completion of the sale.

Mr. Layman: You will be willing to stipulate the sale would not be complete pending the appeal?

Mr. Moen: This is correct.

[Endorsed]: Filed Nov. 1, 1944. [74]

[Endorsed]: Filed Nov. 1, 1944.

[Endorsed]: No. 10916. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. Jack Taylor, as Commissioner of Public Lands of the State of Washington, and Soundview Pulp Company, a Washington corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed November 9, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10,916

CHESTER BOWLES, Administrator Office of
Price Administration,

Appellant,

vs.

JACK TAYLOR, as Commissioner of Public
Lands of the State of Washington, and
SOUNDVIEW PULP COMPANY, a Wash-
ington Corporation,

Appellees.

STATEMENT OF POINTS

Appellant hereby adopts as its points on ap-

peal the statement of points heretofore filed in this action with the District Court of the United States for the Western District of Washington, Southern Division, and included in the original certified record, on page 45 thereof.

Dated this 9th day of November, 1944.

THOMAS I. EMERSON

Deputy Administrator

FLEMING JAMES JR.

Director, Litigation Division

ABRAHAM GLASSER

Spécial Appellate Attorney

W. DUNLAP CANNON JR.

Regional Litigation Attorney

GEORGE H. LAYMAN

District Enforcement

Attorney

Attorneys for Appellant

Due service of the within Statement of Points is hereby accepted this 17th day of November, 1944, by receipt of copy thereof.

R. A. MOEN

Assistant Attorney-General. One of the attorneys for appellee, Jack Taylor, as Commissioner of Public Lands of the State of Washington.

W. Z. KERR and

KERR, McCORD & CAREY

Attorneys for Appellee.

Soundview Pulp Company.

[Endorsed]: Filed Nov. 25, 1944. Paul P. O'Brien, Clerk.

No. 10916

**IN THE
United States Circuit Court of Appeals
For the Ninth Circuit**

**CHESTER BOWLES, Administrator, Office of
Price Administration,**

Appellant,

vs.

**JACK TAYLOR, as Commissioner of Public Lands
of The State of Washington, and SOUND-
VIEW PULP COMPANY, a Washington
Corporation,**

Appellees.

**Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

[Title of Circuit Court of Appeals and Cause.]

**STIPULATION FOR SUBSTITUTION OF
DEFENDANT-APPELLEE**

Whereas, since January 10, 1945, Otto A. Case has been and now is the duly elected, qualified, and acting Commissioner of Public Lands of the State of Washington, and is serving in place of Jack Taylor, a defendant-appellee in this action; and

Whereas, there is a substantial need for continuing this action against Otto A. Case, as successor in office to the said Jack Taylor, because the action involves sales of state-owned timber, and determination of questions of law which are important for all parties hereto and the State of Washington; now, therefore,

It Is Hereby Stipulated by and between the parties hereto, acting through their respective attorneys of record, that Otto A. Case, as commissioner of Public Lands of the State of Washington, be substituted as party defendant-appellee in place of Jack Taylor; that this action be continued against the said Otto A. Case in his official capacity with the same effect as though he had been an original party thereto; and that service of process or notice is waived by said Otto A. Case, who enters general appearance herein.

Dated this 15th day of January, 1945.

GEORGE H. LAYMAN,

Of Attorneys for Appellant.

R. A. MOEN,

Assistant Attorney-General

Attorney for Appellee Jack Taylor, as Commissioner of Public Lands for the State of Washington, and for Otto A. Case, as Commissioner of Public Lands of the State of Washington.

KERR, McCORD & CAREY

W. Z. KERR

Attorneys for Appellee,

Soundview Pulp Company.

So Ordered:

CURTIS D. WILBUR,

Senior United States Circuit Judge.

[Endorsed]: Filed January 23, 1945. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, April 12, 1945.

Before: Healy and Bone, Circuit Judges,
McColloch, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Abraham Glasser, counsel for appellant, and by Mr. R. A.

Moen, Assistant Attorney General of the State of Washington, counsel for appellee, Otto Case,—Mr. Stephen V. Carey, counsel for appellee, Soundview Pulp and Paper Company, being present—and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, May 28,
1945.

Before: Healy and Bone, Circuit Judges,
and McColloch, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF DE-
CREE

By direction of the Court, Ordered that the type-written opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United
States for the Western District of Washington,
Southern Division

Before: Healy and Bone, Circuit Judges
McColloch, District Judge

Healy, Circuit Judge

OPINION

Involved here is an appeal by the Administrator of the Emergency Price Control Act of 1942, as amended, from a judgment denying injunctive relief. The principal defendant in the suit is the Commissioner of Public Lands of the State of Washington, to whom we shall refer as the Commissioner.

In September 1943 the War Production Board requested the Commissioner to make available for sale the timber on the south half of a designated section of state-owned school lands. The Commissioner caused the timber to be appraised and gave notice that it would be sold at public auction to the highest bidder.¹ At the auction there were two bidders, the Soundview Pulp Company and the Coos Bay Pulp Corporation. The bid of Soundview was \$86,336.39. That of Coos Bay was \$77,853.25, which was the maximum price of the timber as determined under OPA Regulation 460. The official in charge of the sale accepted Soundview's bid.

¹The value as determined by the appraisal was \$60,354.50.

Soundview was thereupon informed by the Office of Price Administration that its bid was in excess of the price ceiling fixed by the regulation, hence a purchase at that figure would offend against the Act.

There followed a series of suits in the Washington courts, participated in by the Commissioner on the one hand and the Soundview and Coos Bay companies on the other, the several suits being ultimately consolidated for trial. On appeal it was held (by a sharply divided court) that the state owned the timber in its sovereign and governmental capacity and that Congress did not intend the Emergency Price Control Act to apply to a state in respect of the sale of a commodity so owned, it being conceded, however, that the Act affects sales by the state of property held in a proprietary capacity. *Soundview Pulp Co. v. Taylor, Commissioner*, 150 Pac. 2d 839. The court pointed to the terms of the Enabling Act providing that all lands granted the state for educational purposes should be disposed of only at public sale for not less than \$10 per acre, the proceeds to constitute a permanent school fund; and it quoted a similar provision of the state constitution requiring such sales to be made at auction to the highest bidder. "It therefore follows," said the court, "that in selling timber grown on state school lands the Commissioner of Public Lands must do so in accordance with the Enabling Act and the constitution and statutes of the State of Washington irrespective of any order or regulation of the Office of Price Administration."

The Administrator then brought this suit against the Commissioner and Soundview, asking that they be enjoined from consummating the proposed transaction. A temporary restraining order was granted, but at the conclusion of the trial the order was vacated and the complaint dismissed. However, upon stipulation, it was ordered that the status quo be maintained pending an appeal. The views announced by the trial court substantially conformed with those of the Washington Supreme Court heretofore analyzed. While the judge conceded that Regulation 460 in terms applies to the subject matter, it was thought that despite the provisions of §204(d) of the Act the extraordinary remedy of injunction should not be granted where the court is persuaded that the regulation goes beyond the terms of the statute.

Maximum Price Regulation No. 460 became effective August 31, 1943.² It establishes maximum prices for western timber and covers all sales of such timber "if the primary purpose of the purchase is the acquisition of timber for commercial conversion into timber products." States and their political subdivisions are expressly made subject to the terms of the regulation. Section 5 establishes the method for computing the maximum legal prices of publicly-owned timber.²

²The computation is made by taking the appraised value, based on appraisal principles used by the public agency during 1941, plus specific additions for timber sold per 1000' log scale; and, for timber sold on a lineal foot basis, the computation is made by adding a flat 20% to the appraised value.

Normally, it would seem that §204(d) does not, in a judicial proceeding other than in the Emergency Court, permit of questioning the validity of a regulation by the process of construing the statute. Two state courts of last resort, in considering the problem as related to the sale of publicly-owned property, have thought otherwise.³ In the circumstances we hesitate to rest decision on the ground that such mode of attack is here foreclosed, persuaded, as we are, that Regulation 460 has ample statutory warrant.

In the Act itself [§302(h)] the term "person" is defined as including "the United States or any agency thereof or any other government, or any of its political subdivisions, or any agency of the foregoing: Provided, that no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency." So comprehensive is the definition that nothing short of an express exclusion of the states and their political subdivisions would serve to exempt sales made by them from the sweep of the statute.⁴ Nor is there anything in the language of the Act, or in its history or purpose, suggestive of the exemption of commodities owned in a governmental capacity. Cf. *United States v. California*, 297 U. S. 175. The aim of the legislation is the control of commodity prices irrespective of who owns the commodity or

³ *Soundview Pulp Co. v. Taylor*, *supra*; *Twin Falls County v. Hulbert* (Ida.), 156 P. 2d 319.

⁴ Consult, *contra*, *Twin Falls County v. Hulbert*, *supra*, note 3.

in what capacity it is held.^{4a} Certain of the western states, as Congress well knew, are among the large owners of timber.⁵ If they were left exempt, their sales at unrestricted competitive bidding would disrupt attempts looking toward the control of the price of this scarce and essential commodity, as well as the price of the processed product. Nor would the evil necessarily stop there. It is a commonplace that inflation at one point tends to beget inflationary consequences at others.

The problem has been approached by the courts so far considering it as though it presented a conflict of interest between the states and the national government. The conflict, we think, is apparent only. This is not a sectional matter. Wartime inflation is no respecter of state boundaries; it invades every home and rifles every pocketbook. The interest of the people of Washington, no less than that of the nation as a whole, is strongly engaged in the fight against this insidious enemy.⁶ Nor does any invasion of state rights emerge, even technically. The power to wage war has been com-

^{4a} See §203 (c).

⁵ See "Statement of considerations for Regulation No. 460" filed by the Administrator with the Division of the Federal Register, 7 F. R. 7871, 8 F. R. 4681.

⁶ Notoriously, the common schools and higher institutions of learning are among the most grievous sufferers from wartime inflation. The prevention of hardship to these institutions is among the declared purposes of the Price Control Act. See §1(a).

mitted by the states to the national government. The latter would be remiss in the exercise of this delegated power if, out of tenderness for the supposed sensibilities of the states, it failed in dire emergency to employ all suitable means for waging war effectively.

There does arise, of course, during the continuance of the emergency, a conflict between state and federal law. But this conflict is resolved by the supremacy clause of the federal constitution. The constitutionality of the emergency price control legislation has been set at rest in *Yakus v. United States*, 321 U. S. 414, and *Bowles v. Willingham*, 321 U. S. 503.

Both below and here the Commissioner has questioned the jurisdiction of the court on the grounds: (1) that the action is against the State, and by §233 of the Judicial Code exclusive jurisdiction thereof is vested in the Supreme Court; (2) that under [266 of the Judicial Code the case is one for hearing by a three-judge court; and (3) the attorneys representing the Administrator are not authorized to institute suit on behalf of the United States.

We think the points are without merit. We have already said that the state is a person within the intendment of the Act. If it be assumed that the suit, although in form against the Commissioner, is in substance a suit against the state, nevertheless jurisdiction is by §205 of the Act vested in the District Courts. Cf. *United States v. California*, 297 U. S. 175. As to the contention based on §266 of

the Judicial Code, it is enough to say that the restraining order is not here sought upon the ground of the unconstitutionality of the state statute, but upon the ground of the supremacy of the federal law. Cf *Farmers Gin Company v. Hayes*, 54 F. Supp. 43. In respect of the third contention, it is sufficient to note that §201(a) of the Act provides in part that "attorneys appointed under this section may appear for and represent the Administrator in any case, in any court." Consult also §205(a) and (b).

Reversed.

[Endorsed]: Opinion. Filed May 28, 1945. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10916

CHESTER BOWLES, etc.,

Appellant,

vs.

OTTO A. CASE, etc.,

Appellee.

DECREE

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the

United States for the Western District of Washington, Southern Division, and was duly submitted.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed.

[Endorsed] Filed and entered May 28, 1945.
Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**PRAECIPE AND DESIGNATION OF
RECORD FOR CERTIORARI**

To: Paul P. O'Brien, Esq., Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

You will please prepare and transmit to the Clerk of the Supreme Court of the United States a transcript of the record on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The printed transcript of the record on which this cause was heard in the Circuit Court of Appeals.

2. Stipulation and order substituting Otto A. Case, as Commissioner of Public Lands of the State of Washington, as defendant, appellee herein.

in the place of Jack Taylor, as Commissioner of Public Lands of the State of Washington.

3. Order of submission
4. Opinion of the court.
5. Order directing filing of opinion.
6. Judgment of the Circuit Court of Appeals.
7. Order staying issuance of mandate.
8. Clerk's certificate of record.
9. Copy of this designation.

Dated at Olympia, Washington, this 16th day of June, 1945.

SMITH TROY,

Attorney General, State of
Washington

R. A. MOEN,

Assistant Attorney General,
State of Washington

Attorneys for appellee Otto A. Case, as Commissioner of Public Lands of the State of Washington.

[Endorsed]: Filed June 18, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF
MANDATE

— Upon application of Honorable Smith Troy, counsel for the appellee, Otto A. Case, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including July 31, 1945; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WILLIAM HEALY,

United States Circuit Judge.

Dated: San Francisco, California, June 18, 1945.

: [Endorsed]: Filed June 18, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty (80) pages, numbered from and including 1 to and including 80, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of June, 1945.

[Seal]

PAUL P. O'BRIEN,

Clerk

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 15, 1945

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

(1172)

FILE COPY

Office - Supreme Court, U. S.

FILED

JUL 26 1945

CHARLES ELMORE TROPLEY
CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, A. D. 1945

No. 261

OTTO A. CASE, as Commissioner of Public
Lands of the State of Washington,
Petitioner,

v.

CHESTER BOWLES, Administrator, Office of
Price Administration, and SOUNDVIEW
PULP COMPANY, a Washington corpora-
tion,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT
OF APPEALS, NINTH CIRCUIT**

SMITH TROY,
Attorney General, State of Washington.

R. A. MOEN,
Assistant Attorney General, State of Washington.

EDWIN C. EWING,
Assistant Attorney General, State of Washington.

Attorneys for Petitioner,
OTTO A. CASE,
as Commissioner of Public Lands of the State of Washington.

Office and Post Office Address: Temple of Justice, Olympia, Wash.

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, A. D. 1945

No. _____

OTTO A. CASE, as Commissioner of Public
Lands of the State of Washington,
Petitioner,

v.

CHESTER BOWLES, Administrator, Office of
Price Administration, and SOUNDVIEW
PULP COMPANY, a Washington corpora-
tion, *Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT
OF APPEALS, NINTH CIRCUIT**

SMITH TROY,
Attorney General, State of Washington.

R. A. MOEN,
Assistant Attorney General, State of Washington.

EDWIN C. EWING,
Assistant Attorney General, State of Washington.

Attorneys for Petitioner,
OTTO A. CASE,
as Commissioner of Public Lands of the State of Washington.

Office and Post Office Address: Temple of Justice, Olympia, Wash.

SUBJECT INDEX

	Pages
Summary statement of the matter involved	7
Jurisdictional Statement	11
Questions presented	16
Reasons relied on for the allowance of the writ	17
Appendix A (Provisions of Emergency Price Control Act of 1942, as amended)	23
Appendix B (Maximum Price Regulation No. 460)	41
Appendix C (Provisions of enabling act)	48
Appendix D (Provisions of State Constitution)	50
Appendix E (Provisions of State Statutes)	54
Appendix F (Federal Statutes)	58
Appendix G (Soundview Pulp Company v. Taylor, 21 Wn. (2d) 261, 150 P. (2d) 839)	59

TABLE OF AUTHORITIES CITED

CASES

Ansaldo San Giorgio I v. Rheimstrom Bros. Company, 294 U. S. 494, 55 S. Ct. 483, 79 L. Ed. 1016	21
Bowles v. American Brewery, Inc., 56 F. Supp. 82	20
Bowles v. Bonnie Bee Shop, 55 F. Supp. 754	20
Bowles v. Good Luck Glove Company (C. C. A. 7), 143 F. (2d) 579	20
Bowles v. Nu Way Laundry Company (C. C. A. 10), 144 F. (2d) 741	20
Bowles v. Texas Liquor Control Board, 148 F. (2d) 265	19
Bowles v. Willingham, 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892	20

TABLE OF AUTHORITIES CITED—Continued

CASES

	Pages
Boylan v. United States, 257 U. S. 614, 42 S. Ct. 113, 66 L. Ed. 397	11
Dayies Warehouse Company v. Bowles, 321 U. S. 144, 64 S. Ct. 474, 88 L. Ed. 635	19
Farmers' Gin Company v. Hayes, 54 F. Supp. 47	20
Federal Security Administrator v. Quaker Oats Company, 318 U. S. 218, 63 S. Ct. 589, 87 L. Ed. 724	19
Forsyth v. Hammond, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095	18
Miles v. Illinois Central Railroad Company, 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. 1129; Rehearing denied, 316 U. S. 708, 62 S. Ct. 1037, 86 L. Ed. 1775	19
National Labor Relations Board v. Newport News Shipbuilding and Dry Dock Company, 308 U. S. 241, 60 S. Ct. 203, 84 L. Ed. 219	21
O'Donnell v. Great Lakes Dredge and Dock Company, 318 U. S. 36, 63 S. Ct. 488, 87 L. Ed. 596	19
Soundview Pulp Company v. Taylor, 21 Wn. (2d) 261, 150 P. (2d) 839	9, 17, 18
Speicher v. Sowell, 303 Mich. 54, 14 N. W. (2d) 651	18, 20
Twin Falls County v. Hulbert (Idaho), 156 P. (2d) 319	18, 20
West India Oil Company v. Domenech, 311 U. S. 20, 61 S. Ct. 90, 85 L. Ed. 16; Rehearing denied, 311 U. S. 729, 61 S. Ct. 314, 85 L. Ed. 474	21
Worcester County Trust Company v. Riley, 302 U. S. 292, 58 S. Ct. 185, 82 L. Ed. 268	19
Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834	19, 20

TABLE OF AUTHORITIES CITED—Continued

STATUTES

Pages

Constitution, State of Washington, Article XVI, section 2.....	12
Constitution, United States, Article II, section 3.....	16
Constitution, United States, Fifth Amendment.....	13
Constitution, United States, Tenth Amendment.....	13
Emergency Price Control Act of 1942, as amended.....	{ 8, 10, 11, 13, 14 15, 16, 18, 21
Judicial Code, section 233 (28 U.S.C., section 341).....	12, 14, 15, 16
Judicial Code, section 240 (28 U.S.C., section 347a).....	11
Judicial Code, section 266 (28 U. S. C., section 380).....	12, 15, 16
United States Code, Title 28, section 350.....	11

MISCELLANEOUS

Maximum Price Regulation No. 460, (8 F. R. 11850).....	8, 9, 11, 12, 13, 15
Supreme Court Rule 38(5) (b).....	19, 21

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, A. D. 1945

No. _____

OTTO A. CASE, as Commissioner of Public
Lands of the State of Washington,
Petitioner,

v.

CHESTER BOWLES, Administrator, Office of
Price Administration, and SOUNDVIEW
PULP COMPANY, a Washington corpora-
tion,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT
OF APPEALS, NINTH CIRCUIT**

To the HONORABLE HARLAN FISKE STONE, Chief Justice of
the United States, and to the Associate Justices of the
Supreme Court of the United States:
Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit in equity, brought in the United States
District Court for the State of Washington, Western Dis-
trict, Southern Division, by Chester Bowles, Adminis-
trator, Office of Price Administration, one of the respond-

ents herein, against Jack Taylor, as Commissioner of Public Lands of the State of Washington, and against Soundview Pulp Company, a Washington corporation, the other respondent herein, to restrain and enjoin an alleged attempt to violate the terms of Maximum Price Regulation No. 460 (8 F. R. 11850), issued by the Price Administrator under the alleged authority of the Emergency Price Control Act (R. 2-6).

Jack Taylor, as Commissioner of Public Lands of the State of Washington, was succeeded in office by Otto A. Case, petitioner herein, who was duly substituted as party defendant in this action while the case was on appeal to the Circuit Court of Appeals (R. 68, 69).

The facts in the case are not in dispute and may be summarized as follows:

In September, 1943, the Western Log and Timber Administrator of the War Production Board issued a directive to the Commissioner of Public Lands of the State of Washington to sell the timber on the south half of a designated school section in the State of Washington (R. 21). In compliance with the directive, the timber was offered for sale at public auction. Two companies, namely, Coos Bay Pulp Corporation and Soundview Pulp Company, submitted competing bids, Coos Bay offering \$77,853.25 and Soundview offering \$86,336.39 for the timber (R. 21). The bid of Coos Bay was the maximum price of the timber, as determined under Maximum Price Regulation No. 460 (R. 4).

The Commissioner of Public Lands immediately advised the proper officials of the War Production Board and the Office of Price Administration that the sale had re-

sulted in receiving bids in excess of the ceiling price, as determined under the provisions of Maximum Price Regulation No. 460, called their attention to his duties under the congressional Enabling Act admitting the State of Washington into the Union of the United States and under the Constitution of the State of Washington, to award all sales of timber from the school sections to the highest bidder, and requested those government officials to suggest a proper course of procedure (R. 22).

Before any satisfactory solution to the problem had been agreed upon, both bidders commenced actions against the Commissioner of Public Lands to determine the validity of the respective bids and to complete the sale. The actions were consolidated for trial, the Price Administrator appearing as *amicus curiae*, and at the conclusion of the trial, the trial court determined that the state was bound by the directive of the War Production Board and subject to the maximum price ceilings issued by the Price Administrator, and issued a mandate directing completion of the sale to the Coos Bay Pulp Corporation at the ceiling price (R. 23).

The Commissioner of Public Lands appealed the decision to the Supreme Court of the State of Washington, which court, in an opinion dated July 22, 1944, and reported in 21 Wn. (2d) 261, 150 P. (2d) 839¹, reversed the decision of the trial court, and held that the Emergency Price Control Act was not applicable to the sale in question or to any other sales of timber made by defendant in behalf of the State of Washington in the performance of its governmental functions. *Soundview Pulp Company v. Taylor*, 21 Wn. (2d) 261, 150 P. (2d) 839¹, (R. 23, 24).

Before judgment could be entered, in conformance with said opinion, the Price Administrator commenced the present action to enjoin the Commissioner of Public Lands and the Soundview Pulp Company from completing the sale. Issues were framed and, after a hearing on the merits, the District Court held that Congress had not, in the Emergency Price Control Act, conferred authority on the Price Administrator to set maximum prices for sales of school land timber by the State of Washington, made in its sovereign and governmental capacity (R. 39), and, consequently, dissolved the temporary restraining order, denied the Price Administrator's prayer for a permanent injunction, and dismissed the complaint (R. 39, 40). The oral decision of the District Court, though not reported, is in the record (R. 56-64).

The Price Administrator thereupon appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 41). On May 28, 1945, the Circuit Court rendered its decision (R. 71-77), holding that the Emergency Price Control Act was applicable to states and that the Price Administrator had authority to issue price regulations controlling the instant sale and ordered reversal of the District Court judgment (R. 77, 78).

This writ of certiorari is sought to review that opinion and decree.

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under section 240 of the Judicial Code, as amended, being section 347a of Title 28 of the United States Code.

The decree of the Circuit Court was filed and entered May 28, 1945 (R. 77, 78). The time for seeking certiorari began to run from the day said decree was entered. *Boylan v. United States*, 257 U. S. 614, 42 S. Ct. 113, 66 L. Ed. 397. This petition is filed within three months after the entry of the decree, as required by section 350 of Title 28 of the United States Code.

The provisions of the Enabling Act, State Constitution, Federal statutes including the Emergency Price Control Act, as amended, and Maximum Price Regulation No. 460, pertinent to a proper determination of the issues herein, are set out in appendices hereto. The issues for determination by this court are all questions of law, framed by the pleadings of the parties. There are no issues of fact presented. The issues were framed in the following manner:

The Price Administrator commenced the present action on July 28, 1944, to secure a temporary restraining order and a permanent injunction by filing his complaint (R. 2-6), motion for preliminary injunction and temporary restraining order (R. 7, 8), with supporting affidavit (R. 8-10) in the appropriate United States District Court. The defendant, Commissioner of Public Lands, on August 8, 1944, filed a motion to dismiss for reasons, among others, which included:

1. The complaint failed to state a cause of action upon which relief could be granted.

2. The District Court would not have jurisdiction over the subject matter or person of the defendant Commissioner of Public Lands for the reason that section 233 of the Judicial Code (28 U. S. C., section 341) vested exclusive jurisdiction in cases of this kind in the Supreme Court of the United States.

3. If the District Court had jurisdiction, it could only be exercised by a three judge court, as provided for by section 266 of the Judicial Code (28 U. S. C., section 380).

4. Neither the complaint for injunction nor the affidavit in support of the motion for temporary restraining order alleged any authorization to the attorneys who were purporting to represent the Price Administrator, nor were the pleadings signed by the Attorney General of the United States or by any officer of the Department of Justice, as required by law.

The defendant Commissioner of Public Lands, on August 8, 1944, also filed a motion to convene a three judge court (R. 16), as provided by section 266 of the Judicial Code, for the reason that the suit was one to enjoin enforcement of Article XVI, section 2, of the Washington State Constitution and the statutes of the State of Washington relating to the sale of state owned timber.

The defendant Commissioner of Public Lands, on August 8, 1944, also filed an answer, admitting the facts pleaded in the complaint, but denying that Maximum Price Regulation No. 460 had any application to the sale in question. Said defendant Commissioner, by way of further answer, alleged the facts as set forth in the

summary statement herein and pleaded three affirmative defenses, as follows:

1. That the Emergency Price Control Act did not, by its terms or intendment, apply to sales made by a sovereign state in the performance of its governmental functions (R. 26).

2. That if the Emergency Price Control Act authorized the issuance of Maximum Price Regulation No. 460, then the Price Control Act was unconstitutional in its operational effect because it violated the Fifth and Tenth Amendments to the Federal Constitution (R. 26).

3. That the Emergency Price Control Act expressly stated that no punishment provided by the act should apply "to the United States, or to any such government, political subdivision, or agency," and inasmuch as the Price Administrator is seeking to enjoin the Commissioner of Public Lands, acting in his official capacity as an officer of the State of Washington, the Administrator was seeking a remedy against said defendant which, by the terms of the act itself, had been denied plaintiff (R. 26).

On August 11, 1944, the Price Administrator filed a motion to strike the three affirmative defenses set forth in the answer of the defendant Commissioner of Public Lands on the ground of their immateriality and failure to constitute a defense to the complaint (R. 33, 34).

The defendant Soundview Pulp Company, on August 11, 1944, filed a separate answer indicating that this defendant did not desire to engage in any dispute with the Price Administrator on any issue of law or fact, but desired merely that the matters involved be adjudicated, inasmuch as the defendant was "still in doubt as to its

rights, status and legal relations with the State of Washington and the United States Government as they are affected by the constitution and statutes of the State of Washington and the statutes, orders and regulations of the United States and desire only to act in a legal manner as a court of competent jurisdiction shall declare those rights." (R. 27-33.)

A full hearing of the cause on the merits was held before the District Court on August 11, 1944. The parties admitted in open court that the facts alleged in the complaint and answer were correct and the only questions before the court were issues of law (R. 54). The court, in a series of preliminary rulings, overruled the jurisdictional contentions of the defendant Commissioner of Public Lands, that is, those which raised issues as to the exclusive jurisdiction of the Supreme Court, as to the necessity of convening a three judge court, and as to the institution of the suit by the Price Administrator without the approval of the Department of Justice (R. 39), and held, on the merits of the case, that the Emergency Price Control Act had not authorized the Price Administrator to promulgate maximum price regulations applicable to the sale in question (R. 56-64), and therefore entered judgment dissolving the temporary restraining order and dismissing the complaint (R. 39, 40).

The Circuit Court of Appeals, in reversing the decision of the District Court, necessarily determined:

1. That the Emergency Price Control Act is applicable to sales made by states in the performance of purely governmental functions.
2. That the District Court had jurisdiction, notwithstanding the provisions of section 233 of the Judicial

Code, to enjoin a state officer, acting on behalf of the state, from a threatened violation of a maximum price regulation.

3. That an action to enjoin a state official from carrying out his duties in accordance with a mandate of the State Constitution, because the constitutional provision conflicts with the regulation of the Price Administrator, does not require a three judge court, under section 266 of the Judicial Code.

4. That the attorneys appointed by the Price Administrator are authorized to institute and prosecute actions for the United States, independent of the Department of Justice.

The questions involved are substantial. Both the Enabling Act and the State Constitution require the state officials to sell timber from school sections at public auction to the highest bidder. This grant, together with its acceptance by the state, constitutes a solemn compact, or treaty, between the state and the United States, the terms and conditions of which cannot be changed without the consent of both parties. The construction placed upon the Price Control Act by the Price Administrator, in promulgating Maximum Price Regulation No. 460, sets aside or, at least for the time being, repeals the terms of the Enabling Act, the State Constitution, and the compact resulting therefrom. In addition thereto, the construction placed upon the Price Control Act by the Price Administrator overrules and supersedes the exclusive jurisdiction provisions of section 233 of the Judicial Code, the requirements of section 266 of the Judicial Code for a three judge court to enjoin compliance with the state law, and the provisions of the Judicial Code centralizing

control of "all civil actions in which the United States are concerned" in the Department of Justice. These problems all present substantial Federal questions which have never been, but should be, determined by this court.

QUESTIONS PRESENTED

1. Is the Emergency Price Control Act applicable to states?

2. Is the Price Administrator authorized by the Emergency Price Control Act to issue maximum price regulations superseding and setting aside the compact between the United States and the State of Washington granting lands to the state to be held in trust for educational purposes, and if so, is the act constitutional, in view of the doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other?

3. Has the Federal District Court jurisdiction to enjoin a sovereign state from a threatened violation of a maximum price regulation, notwithstanding the provisions of Article II, section 3, of the United States Constitution, and section 233 of the Judicial Code, vesting original and exclusive jurisdiction of all controversies of a civil nature in which the state is a party in the Supreme Court of the United States?

4. Does an action brought by the Price Administrator to enjoin the sale of state timber, pursuant to the constitutional and statutory mandates of the state, because in conflict with the applicable maximum price regulation, require the convening of a three judge court, pursuant to the provisions of section 266 of the Judicial Code?

5. Are attorneys appointed by the Price Administrator authorized to commence actions on behalf of the United States, independent of the Department of Justice?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The instant case has been twice litigated: once in the state courts and once in the Federal courts. The decision of the Circuit Court is squarely opposed to the decision of the Supreme Court of the State of Washington, a state court of last resort. Both cases present exactly the same questions on exactly the same state of facts and involved exactly the same sale. The opinion of the Washington court is reported in *Soundview Pulp Company v. Taylor*, 21 Wn. (2d) 261, 150 P. (2d) 839, and is reproduced in this petition in Appendix G. The opinion of the Circuit Court appears in the record, commencing at page 71.

The Commissioner of Public Lands has been offering state owned timber from the school sections for sale at the insistence of the War Production Board that such timber is indispensable to the war effort. If the Commissioner now makes the sale at the ceiling prices, he violates the State Constitution and state laws, as construed by the Supreme Court of the State of Washington, thereby possibly and probably becoming liable on his official bond. But, if the Commissioner proceeds as the Supreme Court of the State of Washington says he must do, then he incurs the risk of contempt proceedings for violation of the injunction the Circuit Court of Appeals, by its decision, orders the District Court to issue. If he refuses to sell at all, he is not

complying with the directives of the War Production Board.

Conflicting decisions by a state court of last resort and a Circuit Court of Appeals on the same set of facts have heretofore been held to be sufficient reason for granting certiorari. *Forsyth v. Hammond*, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095.

2. This court has never determined whether the Price Control Act is applicable to states. So far as we have been able to find, the question has been before three state courts of last resort, namely, Washington, Idaho and Michigan. These cases are reported in *Soundview Pulp Company v. Taylor*, 21 Wn. (2d) 261, 150 P. (2d) 839; *Twin Falls County v. Hulbert* (Idaho), 156 P. (2d) 319, and *Speicher v. Sowell*, 309 Mich. 54, 14 N. W. (2d) 651.

The Washington court held, in a divided opinion, that the Price Control Act was not applicable to states when the sale was made in a sovereign capacity. The Idaho court took a broader view and unanimously held that the Price Control Act was not applicable to sales made by a state. The Michigan court, in a four to four decision, affirmed a Michigan Circuit Court decision that the Price Control Act was not applicable to a liquidation sale in state courts, carried on in compliance with state laws. The decision of the Circuit Court, herein sought to be reviewed, is in conflict with all three of the state court decisions.

The divergence of opinion expressed in these cases, and the contrariety of reasons assigned to support the opinions rendered, demonstrate the need for an authoritative decision of the question from this court. The

question presented is an important one of Federal law which has not been, but should be, settled by the Supreme Court of the United States. Subdivision (b), Supreme Court Rule 38(5), enumerates this as a likely reason for granting certiorari. Cases where certiorari has been granted for this reason include:

Miles v. Illinois Central Railroad Company, 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. 1129; Rehearing denied, 316 U. S. 708, 62 S. Ct. 1037, 86 L. Ed. 1775;

Worcester County Trust Company v. Riley, 302 U. S. 292, 58 S. Ct. 185, 82 L. Ed. 268;

O'Donnell v. Great Lakes Dredge and Dock Company, 318 U. S. 36, 63 S. Ct. 488, 87 L. Ed. 596;

Federal Security Administrator v. Quaker Oats Company, 318 U. S. 218, 63 S. Ct. 589, 87 L. Ed. 724.

3. Two Circuit Courts have had presented to them the question of whether the Emergency Price Control Act is applicable to states. The question was before the Fifth Circuit in *Bowles v. Texas Liquor Control Board*, 148 F. (2d) 265, and before the Ninth Circuit in the instant case.

The decisions of the two Circuit Courts are not in conflict so far as their ultimate effect is concerned, although the decisions are based on different grounds. The Fifth Circuit took the position that a determination of the question could be had only in the Emergency Court of Appeals, citing as authority therefor this court's decision in *Davies Warehouse Company v. Bowles*, 321 U. S. 144, 64 S. Ct. 474, 88 L. Ed. 635, and *Yakus v. United States*, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834.

The Ninth Circuit thought it had jurisdiction to determine the question and did, in fact, determine the ques-

tion contrary to petitioner's contentions. Petitioner cannot and does not complain of the Ninth Circuit assuming jurisdiction to determine the question, as it was petitioner's contention that determination of the question by the District and Circuit Courts was necessary and proper for the purpose of determining the District Court's jurisdiction of the party defendant and subject matter of the action. However, in assigning reasons for this court to grant certiorari, we do not believe it improper to point out that in their general approach to the problem the two Circuit Court decisions are not in accord. These decisions, as well as numerous other circuit, district and state court decisions¹ decided since this court's opinion in *Yakus v. United States*, *supra*, and *Bowles v. Willingham*, 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892, demonstrate the need for an elucidating decision from this court as to the right of a trial court, in an action brought by the Price Administrator to restrain and enjoin an alleged violation of a maximum price regulation, to refuse the extraordinary remedy of injunction, where the court is convinced that the regulation goes beyond the terms of the statute, even though the party sought to be restrained had not sought relief in the Emergency Court of Appeals.

Elucidation of its own decisions is a basic part of the Supreme Court's function. Either the Fifth Circuit

¹See: *Twin Falls County v. Hulbert* (Idaho), 156 P. (2d) 319; *Speicher v. Sowell*, 309 Mich. 54, 14 N. W. (2d) 651;

Bowles v. Nu Way Laundry Company (C. C. A. 10), 144 F. (2d) 741;

Bowles v. Good Luck Glove Company (C. C. A. 7) 143 F. (2d) 579;

Farmers' Gin Company v. Hayes, 54 F. Supp. 47;

Bowles v. Bonnie Bee Shop, 55 F. Supp. 754;

Bowles v. American Brewery, Inc., 56 F. Supp. 82.

misconstrued the *Yakus* and *Willingham* opinions or else those opinions are not sufficiently clear to compel the Ninth Circuit to rest its decision on the exclusive jurisdiction provisions of the Price Control Act.

It seems patent that one of the Circuit Court decisions has determined a "Federal question in a way probably in conflict with applicable decisions of the Supreme Court." Supreme Court Rule 38(5)(b) enumerates this as a likely reason for granting certiorari. Certiorari was granted for this reason in the following cases:

Ansaldo San Giorgio I v. Rheimstrom Bros. Company, 294 U. S. 494, 55 S. Ct. 483, 79 L. Ed. 1016;

West-India Oil Company v. Domenech, 311 U. S. 20, 61 S. Ct. 90, 85 L. Ed. 16; Rehearing denied, 311 U. S. 729, 69 S. Ct. 314, 85 L. Ed. 474;

National Labor Relations Board v. Newport News Shipbuilding and Dry Dock Company, 308 U. S. 241, 60 S. Ct. 203, 84 L. Ed. 219.

Wherefore, your petitioner prays that a writ of certiorari issue, under the seal of this court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the records and of the proceedings of said Circuit Court in the case numbered and entitled on its docket "No. 10,916, Chester Bowles, Administrator, Office of Price Administration, Appellant, v. Otto A. Case, as Commissioner of Public Lands of the State of Washington, and Soundview Pulp Company, a Washington corporation, Appellees," to the end that this cause may be reviewed and determined by this court, as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed

by this court, and for such further relief as the court may deem proper.

DATED this 12th day of July, 1945.

OTTO A. CASE,
as Commissioner of Public Lands of the State of Washington.

By SMITH TROY,
Attorney General, State of Washington.

R. A. MOEN,
Assistant Attorney General, State of Washington.

EDWIN C. EWING,
Assistant Attorney General, State of Washington.

Attorneys for Petitioner

Appendix A

EXPLANATORY NOTE

Throughout this collation roman type is used to indicate text which has not been changed since original enactment, and italics are used to indicate amendments.

[EMERGENCY PRICE CONTROL ACT, OF 1942,¹ AS
AMENDED, JUNE 30, 1944]

TITLE I—GENERAL PROVISIONS AND AUTHORITY

PURPOSES; TIME LIMIT; APPLICABILITY

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in se-

¹56 Stat. 23; 50 U. S. C. App. secs. 901-946.

curing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on *June 30, 1945*,² or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of the Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sus-

²Originally "June 30, 1943." On October 2, 1942, amended to read "June 30, 1944" (sec. 7 (a) of Stabilization Act of 1942, 56 Stat. 767). On June 30, 1944, amended to read "June 30, 1945" (sec. 101 of Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess.).

faining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

(c) The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia.

PRICES, RENTS, AND MARKET AND RENTING PRACTICES.

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threatened to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the

commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods.*³ Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, *and shall give consideration to their recommendations*⁴. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee

³Added by sec. 102 of Stabilization Extension Act of 1944.

with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, *and such recommendations shall be considered by the Administrator.*³ Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

* * * * * * *

SEC. 2. (c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. *Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevail-*

³Added by sec. 102 of Stabilization Extension Act of 1944.

ing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs.³ Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

* * * * *

SEC. 2. (g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

* * * * *

³Added by sec. 102 of Stabilization Extension Act of 1944.

SEC. 201. (d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

SEC. 203. (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,¹⁵ any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provisions and affidavits or other written evidence in support of such objections.¹⁶ Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,¹⁷ the Ad-*

¹⁵As amended by sec. 106 of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

¹⁶As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

¹⁷As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

ministrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs. Provided, however, That, upon the request of the protestant, any protest filed in accordance with subsection (a) of this section after September 1, 1944, shall before denial in whole or in part, be considered by a board of review consisting of one or more officers or employees of the Office of Price Administration designated by the Administrator in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees thereof, and shall provide that, upon the request of the protestants and upon a showing that material facts would be adduced thereby, subpoenas shall issue to procure the evidence of persons; or the

production of documents, or both. The Administrator shall cause to be presented to the board such evidence, including economic data, in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board and the board shall make written recommendations to the Price Administrator. The protestant shall be informed of the recommendations of the board and, in the event that the Administrator rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection.¹⁸

(d) Any protest filed under this section shall be granted or denied by the Administrator, or granted in part and the remainder of it denied, within a reasonable time after it is filed. Any protestant who is aggrieved by undue delay on the part of the Administrator in disposing of his protest may petition the Emergency Court of Appeals, created pursuant to section 204, for relief; and such court shall have jurisdiction by appropriate order to require the Administrator to dispose of such protest within such time as may be fixed by the court. If the Administrator does not act finally within the time fixed by the court, the protest shall be deemed to be denied at the expiration of that period.¹⁹

REVIEW

Sec. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint, with the Emer-

¹⁸Added by sec. 106 of Stabilization Extension Act of 1944.

¹⁹Added by sec. 106 of Stabilization Extension Act of 1944.

gency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceeding in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as

he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or

more members, and any such division may render judgment as the judgment of the court. *Two judges shall constitute a quorum of the court and of each division thereof.*²⁰ The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket

²⁰Added by sec. 107 (a) of Stabilization Extension Act of 1944.

and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any

objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expira-

tion of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.²¹

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage

²¹Entire subsec. (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

* * * * *

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found: *Provided, however, That all suits under subsection (e) of this section shall be brought in the district or county in which the defendant resides or has a place of business, an office, or an agent.*²² Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the

²²Added by sec. 108 (a) of Stabilization Extension Act of 1944.

United States Government in any proceeding under this Act.

Sec. 302. As used in this Act—

(c) The term "commodity" means commodities, articles, products, and materials ~~except~~ materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

(h) The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any

of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency.

Appendix B

MAXIMUM PRICE REGULATION NO. 460

[MPR 460]

WESTERN TIMBER

A statement of the considerations involved in the issuance of this regulation, issued simultaneously herewith, has been filed with the Division of the Federal Register.

§ 1426.251 *Maximum prices for western timber.* Under the authority vested in the Price Administration by the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250, Maximum Price Regulation No. 460 (Western Timber) which is annexed hereto and made a part hereof is hereby issued.

AUTHORITY: § 1426.251 issued under Pub. Laws 421 and 729, 77th Cong.; E. O. 9250, 7 F.R. 7871.

MPR—WESTERN TIMBER

CONTENTS

Sec.

1. Sales of Western timber at higher than maximum prices prohibited.
2. What products are covered.
3. What transactions are covered.
4. What persons are covered.
5. Maximum prices for publicly-owned western timber.
6. Maximum prices for privately-owned western timber.
7. Maximum prices for privately-owned western timber where section 6 cannot be applied.
8. Separate computation of non-timber values where land is sold with timber.

9. Records and reports.
10. Petitions for amendment.
11. Enforcement.

SECTION 1. Sales of western timber at higher than maximum prices prohibited—(a) *General.* On and after August 31, 1943, no person shall sell, buy, or reappraise (or agree or attempt to sell or buy) western timber at higher than the maximum prices established in this regulation. Written firm contracts made, before August 31, 1943 may be completed at the contract price (but where the contracts are reappraised or renegotiated, all the provisions of this regulation shall apply to the reappraisal or renegotiation).

SEC. 2. What products are covered. This regulation covers, under the name "Western timber", all timber (whether green or dead, standing or down, of all species, classes and sizes, where the timber has not been severed from the stump), west of the 100th meridian of longitude.

SEC. 3. What transactions are covered. (a) This regulation covers all sales of western timber if the primary purpose of the purchase is the acquisition of timber for commercial conversion into timber products. If the value of the timber constitutes 60 percent or more of the total consideration, it shall be conclusively presumed that the primary purpose of the purchase was the acquisition of timber for commercial conversion.

(b) This regulation does not cover transactions involving a timber value less than \$1,000.

(c) This regulation does not cover or affect transactions where the purchaser does not have the right to cut any timber for a period of 10 years or more from the date of the contract.

SEC. 4. *What persons are covered.* Any person who makes the kind of sale or purchase covered by this regulation is subject to it. The term "person" includes: an individual, corporation, partnership, association, or any other organized group of persons, or their legal successors, or representatives; the United States, any State or any government, or any of its political subdivisions; or any agency of the foregoing.

SEC. 5. *Maximum prices for publicly-owned western timber.* The maximum prices for publicly-owned timber shall be the total of the appraised valuation for each species (or species price group) offered for sale, plus the additions set forth below. "Appraised value" for the purpose of this regulation shall be based on the appraisal principles used by the public agency during 1941. Where those principles are based on a percentage of outturn of logs, lumber, or primary forest products, the established ceiling price on the product to which it is related shall be used as the basis for the appraisal.

Where appraised value per	Addition per
1000' log scale is:	1000' log scale
\$1.50 and under	\$0.40
\$1.51 to \$2.0050
\$2.01 to \$3.0070
\$3.01 to \$4.0090
\$4.01 to \$5.00	1.05
\$5.01 to \$7.50	1.35
\$7.51 to \$10.00	1.60
\$10.00 and over	1.85

SEC. 6. *Maximum prices for privately-owned western timber.* The maximum price for privately-owned western timber is the appraisal value on the nearest comparable tract of publicly-owned timber, sold since Septem-

ber 1, 1942 plus the additions given in the table in the preceding section. The tract will be considered comparable if it is in the same competitive region, and in any case not more than 500 miles away, and if it is comparable in species, composition, accessibility, density, and grade content.

In choosing the publicly-owned tract to be used for comparison, the basic rule is to take the nearest tract, geographically that meets the general tests of similarity given above.

If the terms of sale or financial arrangements are different from those in the public sale selected for comparison, an appropriate adjustment must be made in the maximum price to reflect the value of the difference in financial terms and basis of measurement.

SEC. 7. Maximum prices for privately-owned western timber where section 6 cannot be applied. When the maximum price for privately-owned western timber cannot be determined under section 6 above, such as sales on percentages of sales of logs, profit sharing, or other arrangements which do not fix the price of the stumpage in specific dollars-and-cents per 1,000 ft., log scale, or when special conditions warrant a different ceiling than that resulting from operation of section 6, the buyer and seller should join in a request by letter to the Lumber Branch, Office of Price Administration, Washington, D.C., for an authorized price. The letter should contain a full description of all of the timber to be sold, including the cruise, estimated amount of timber of each species, the quality of each species and the proposed sales price for each species or group of species. The buyer must furnish evidence that the proposed price will not require

an individual adjustment of the ceilings to which he is subject on logs, lumber, primary forest products or other timber products. If special conditions are the basis for the application, they should be fully described. The Office of Price Administration, by letter or telegram, will either authorize a price or arrangement, or give instructions on how to figure the maximum price. If within 60 days of the receipt of such application the Office of Price Administration has not authorized a price or provided a formula or requested additional information on which such price may be computed, the price or arrangement requested in the application shall be considered approved.

SEC. 8. Separate computation of non-timber values where land is sold with timber. If timber is sold together with land, any non-timber rights or interests forming part of the consideration may be separately evaluated. The non-timber rights or interests are not subject to this regulation.

SEC. 9. Records and reports. In all transactions involving more than \$1,000 worth of western timber, both seller and purchaser must keep a record of the transaction for two years.

In both public sales and private sales the buyer must file a report for each purchase with the Lumber Branch, Office of Price Administration, Washington, D. C.

The records and reports must include the following:

- (1) The state and county in which the timber is located and a legal description of the location;
- (2) The sales or contract price, and where the selling price differs from the appraised price, also the ap-

praised price for each species, or for each group of species if several having the same price are combined in a price group in the transaction;

(3) A statement of the estimated or actual total volume of timber sold, to be shown by species to the extent that species are separated in the estimate, or in actual log scale if available.

(4) In sales of privately-owned timber the records of buyer and seller and the reports of the buyer shall identify the tract of publicly-owned timber which was used as the basis for calculating maximum prices and shall give the appraisal value of the publicly-owned tract.

(5) In transactions involving both publicly-owned and privately-owned timber, the records and reports should indicate to what extent, if any, values other than timber values constituted a part of the consideration involved, together with data in support of these separate values.

SEC. 10. *Petitions for amendment.* Any person seeking an amendment of any provision of this regulation may file a petition for amendment in accordance with the provisions of Revised Procedural Regulation No. 1, issued by the Office of Price Administration.

SEC. 11. *Enforcement.* Persons violating any provisions of this regulation are subject to the criminal penalties, civil enforcement actions and suits for treble damages provided for by the Emergency Price Control Act of 1942.

¹⁷ F.R. 8961, 8 F.R. 3313, 3533, 6173.

NOTE: All reporting and record-keeping requirements of this regulation have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

This regulation shall become effective August 31, 1943.

Issued this 25th day of August 1943.

CHESTER BOWLES,
Acting Administrator,

Appendix C

ENABLING ACT¹

AN ACT to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments, and to be admitted into the Union on an equal footing with the original states; and to make donations of public lands to such states. (Approved February 22, 1889.)

SECTION 10. That upon the admission of each of said states into the Union, sections numbered sixteen and thirty-six in every township of said proposed states, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior: * * *

SECTION 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one

¹25 Stat. at Large 676; Remington's Revised Statutes of Washington, Volume 1, page 331.

section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

SECTION 13. That five per centum of the proceeds of the sales of public lands lying within said states which shall be sold by the United States subsequent to the admission of said states into the Union, after deducting all the expenses incident to the same, shall be paid to the said states, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within the said states respectively.

SECTION 14. * * * None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section eleven of this act. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said states respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. * * *

Appendix D

STATE CONSTITUTION

ARTICLE III

SECTION 1. The executive department shall consist of a governor, lieutenant-governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands, who shall be severally chosen by the qualified electors of the state at the same time and place of voting as for the members of the legislature.

ARTICLE IX

SECTION 1. It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

SECTION 2. The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools.

SECTION 3. The principal of the common school fund shall remain permanent and irreducible. The said fund shall be derived from the following named sources, to wit: Appropriations and donations by the state to this fund; donations and bequests by individuals to the state or public for common schools; the proceeds of lands and

other property which revert to the state by escheat and forfeiture; the proceeds of all property granted to the state, when the purpose of the grant is not specified or is uncertain; funds accumulated in the treasury of the state for the disbursement of which provision has not been made by law; the proceeds of the sale of timber, stone, minerals, or other property from school and state lands, other than those granted for specific purposes; all moneys received from persons appropriating timber, stone, minerals or other property from school and state lands other than those granted for specific purposes, and all moneys other than rental recovered from persons trespassing on said lands; five per centum of the proceeds of the sale of public lands lying within the state which shall be sold by the United States subsequent to the admission of the state into the Union, as approved by section thirteen of the act of congress enabling the admission of the state into the Union; the principal of all funds arising from the sale of lands and other property which have been and hereafter may be granted to the state for the support of the common schools. The legislature may make further provisions for enlarging said fund. The interest accruing on said land, together with all rentals and other revenues derived therefrom, and from lands and other property devoted to the common school fund, shall be exclusively applied to the current use of the common schools.

SECTION 4. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

SECTION 5. All losses to the permanent common school or any other state educational fund which shall be occasioned by defalcation, mismanagement, or fraud of

the agents or officers controlling or managing the same shall be audited by the proper authorities of the state. The amount so audited shall be a permanent funded debt against the state in favor of the particular fund sustaining such loss, upon which not less than six per cent annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized and limited elsewhere in this constitution.

ARTICLE XVI

SECTION 1. All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interests disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

SECTION 2. None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder; and the value thereof, less the improvements, shall, before any sale, be appraised by a board of appraisers, to be provided by law, the terms of payment also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land. In estimating the value of such lands for disposal, the value of improvements thereon shall be excluded: Provided, that the sale of all school and university land heretofore made by the com-

missioners of any county or the university commissioners, when the purchase price has been paid in good faith, may be confirmed by the legislature.

SECTION 3. No more than one-fourth of the land granted to the state for educational purposes shall be sold prior to January first, eighteen hundred and ninety-five, and not more than one-half prior to January first, nineteen hundred and five: Provided, that nothing herein shall be so construed as to prevent the state from selling the timber or stone off of any of the state lands in such manner and on such terms as may be prescribed by law: And provided further, that no sale of timber lands shall be valid unless the full value of such lands is paid or secured to the state.

SECTION 5, as amended by Amendment 1. None of the permanent school fund of this state shall ever be loaned to private persons or corporations, but it may be invested in national, state, county, municipal, or school district bonds.

Appendix E**STATE STATUTES**

Section 46, chapter 255, Laws of Washington, 1927 (Remington's Revised Statutes of Washington, section 7797-46).

When the commissioner of public lands shall have decided to sell any lot, block, tract, or tracts of state lands, except capitol building lands and university lands, or any tide or shore lands, or the timber, fallen timber, stone, gravel, or other valuable material thereon, or with the consent of the board of regents of the University of Washington, shall have decided to sell any lot, block, tract or tracts of university lands, or the timber, fallen timber, stone, gravel or other valuable material thereon, it shall be the duty of the commissioner of public lands to forthwith fix the date of sale, which date shall be on the first Tuesday of the month in which the sale is to be had, and no sale shall be had in any month in which the first Tuesday shall fall on a legal holiday, and the commissioner shall give notice of the sale by advertisement published once a week for five weeks next before the time he shall name in said notice, in at least one newspaper published and of general circulation in the county in which the whole or any part of any lot, block or tract of land to be sold or the material upon which is to be sold is situated, and by causing a copy of said notice to be posted in a conspicuous place in the office of the county auditor of such county, which notice shall specify the place, time and terms of sale and describe with particularity each parcel of land to be sold, or from which valuable materials are to be sold, and state the appraised value thereof.

Section 50, chapter 255, Laws of Washington 1927 (Remington's Revised Statutes of Washington, section 7797-50).

All sales shall be at public auction to the highest bidder, on the terms prescribed by law and as specified in the notice hereinbefore provided, and no land or materials shall be sold for less than its appraised value.

Section 53, chapter 255, Laws of Washington 1927 (Remington's Revised Statutes of Washington, section 7797-53).

If no affidavit showing that the interest of the state in such sale was injuriously affected by fraud or collusion, shall be filed with the commissioner of public lands within ten days from the receipt of the report of the county auditor conducting the sale of any state lands, or tide or shore lands, or timber, fallen timber, stone, gravel or other valuable material thereon, and it shall appear from such report that the sale was fairly conducted, that the purchaser was the highest bidder at such sale, and that his bid was not less than the appraised value of the property sold; and if the commissioner shall be satisfied that the lands, or material, sold would not, upon being readvertised and offered for sale, sell for at least ten per cent more than the price at which it shall have been sold, and that the payment, required by law to be made at the time of making the sale, has been made, and that the best interests of the state may be subserved thereby, the commissioner of public lands shall enter upon his records a confirmation of sale and thereupon issue to the purchaser a contract of sale, deed or bill of sale, as the case may be, as in this act provided.

Appendix F

FEDERAL STATUTES

Section 233 of the Judicial Code (28 U. S. C., section 341).

SECTION 341. (Judicial Code, section 233.) **Original jurisdiction.** The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers; or in which a consul or vice consul is a party. (R. S. § 687; Mar. 3, 1911, c. 231, § 233, 36 Stat. 1156.)

Section 266 of the Judicial Code (28 U. S. C., section 380).

SECTION 380. (Judicial Code, section 266, amended.) **Same; alleged unconstitutionality of State statutes; appeal to Supreme Court.** No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by, restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice

of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction; but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory in-

junction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit. (June 18, 1910, c. 309, § 17, 36 Stat. 557; Mar. 3, 1911, c. 231, § 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, § 1, 43 Stat. 938.)

Appendix G

SOUNDVIEW PULP COMPANY V. TAYLOR

[No. 29297. *En Banc*. July 22, 1944.]

SOUNDVIEW PULP COMPANY, *Respondent*, v. JACK TAYLOR,
as *Commissioner of Public Lands*, *Appellant*.

THE STATE OF WASHINGTON *on the Relation of Coos Bay*
Pulp Corporation, Respondent, v. JACK TAYLOR, as
Commissioner of Public Lands, Appellant.

COOS BAY PULP CORPORATION, *Respondent*, v. JACK TAY-
LOR, as *Commissioner of Public Lands, Appellant*.

GRADY, J.—Originally three actions were commenced against Jack Taylor, as commissioner of public lands: one by the Soundview Pulp Company, one by the state of Washington on the relation of Coos Bay Pulp Corporation, and another by the latter corporation in its own behalf. In this opinion, the parties will be referred to as Soundview, respondent, and appellant, respectively.

Soundview had been the highest bidder at a public sale of timber grown on state school lands, but was informed by the office of price administration that its bid was in excess of the ceiling price for the timber as provided under maximum price regulation 460 and that if it consummated the purchase the price administrator would hold it responsible for a violation of the emergency price control act of 1942, executive order No. 9250, and the regulation. Soundview deposited the amount of its bid with the appellant. Being unwilling to incur the risks of penalties and possible criminal actions for violation of the act and the regulation, Soundview on December 1, 1943, brought an action against the appellant praying that he be required to refrain from paying the money deposited into the state treasury and not consummate a sale of the timber to it until the United States could be allowed

to intervene in the action and the court determine whether the bid was lawful. A temporary restraining order was issued returnable at a subsequent date. The appellant demurred to the complaint. The United States did not make an appearance in the action.

On December 7, 1943, the respondent in the name of the state filed an affidavit and application for a writ of mandate, to be directed to appellant commanding him to accept its bid for the timber, which bid was in a less amount than that of Soundview, but was for the maximum price fixed by the office of price administration for the timber, and consummate a sale thereof to respondent. An alternative writ was issued. Issues of law and fact were tendered by appellant by demurrer and return to the application and reply.

On December 16, 1943, respondent filed its complaint praying for the same relief as asked in its mandamus proceeding, and in addition that the court determine and declare its rights, status, and other legal relations with reference to the subject matter involved and for a permanent injunction restraining appellant from consummating a sale to Soundview of the timber in question. A temporary restraining order was issued. Issues of law and fact were tendered by appellant by demurrer and answer and reply. All parties entered into a written stipulation to consolidate the cases for trial and an order was entered accordingly.

After the conclusion of the trial, the court made a written decision and later made findings of fact, conclusions of law, and decree sustaining the validity of maximum price regulation 460, adjudging that the total of the bids of respondent was the highest lawful bid made at the sale and directing the appellant to accept the bids and consummate a sale of the timber to the respondent. The decree enjoined appellant from accepting the bids of Soundview and consummating a sale of the timber to it.

and directed appellant to return the check of Soundview deposited with him as payment for the timber.

The appellant has taken an appeal from the decree. Soundview has not appeared in this court. Permission was given by this court to the office of price administration to appear as *amicus curiae*, file a brief, and present oral argument; also, further permission was given to it to file a supplemental brief.

The material facts necessary to a decision of this case are as follows: The state of Washington is the owner in its sovereign and governmental capacity of section 36, township 36 north of range 5 E. W. M. in Skagit county, and became such pursuant to the enabling act by which it was admitted as one of the United States. On September 15, 1943, the war production board issued a "directive" to the appellant asking that the timber on the south half of section 36 be made available for sale on or before October 19, 1943. Pursuant to an application made by respondent for the appraisal and sale of the timber on the south half of section 36, the appellant caused the timber on all of the section to be appraised and gave notice that it would be sold at public auction to the highest bidder on November 23, 1943; that the sale would be made by the auditor of Skagit county at the courthouse in the city of Mount Vernon. At the time and place fixed in the notice, the auditor offered the timber on each quarter section for sale. Soundview and respondent were the only bidders. The figures we use are the collective sums for the four quarter sections. Soundview was the highest bidder. Respondent made claim that, notwithstanding the bids that had been made, the only legal maximum bid that could be made was the ceiling price fixed by the office of price administration, which was \$77,853.25.

The appraised value of the timber was \$60,354.50. The bid of Soundview was \$86,342.39, and that of respondent \$86,342.35. The auditor declared that Sound-

view was the highest bidder and accepted its check in the amount of its bid. Respondent tendered a check to the auditor in the sum of \$77,853.25. The auditor received both checks and sent them with his report of the sale to appellant. The appellant returned respondent's check to it, notified both bidders that Soundview was the successful bidder and that he intended to confirm a sale to Soundview.

The question to be determined by us is whether the appellant had the legal right to make a sale of the timber at a price in excess of the maximum price fixed by the office of price administration.

[1] By the terms of the enabling act, upon the admission of Washington into the Union, sections numbered 16 and 36 in every township therein were granted to it for the support of common schools and it was provided that all lands thereby granted for educational purposes should be disposed of only at public sale and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only should be expended in the support of such schools.

By § 2 of Art. XVI of the state constitution, it is provided that "None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder; and the value thereof, less the improvements, shall, before any sale, be appraised by a board of appraisers, to be provided by law; the terms of payment also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land."

By § 3, it is provided that the timber off any of the state lands may be sold in such manner and on such terms as may be prescribed by law. By legislative enactment the procedure for the sale of the land or the timber separate therefrom is prescribed.

On or about January 30, 1942, the emergency price control act of 1942 became effective. (56 Stat. 23, 50

U. S. C. A. (Sup.), § 901 and subsequent sections.) Its territorial field of operation covers the United States, its territories and possessions, and the District of Columbia. Its stated purpose is in general as follows:

to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; . . .

The office of price administration is created and is given broad powers in determining at what prices commodities shall be bought and sold. An emergency court of appeals is created and it is given exclusive jurisdiction to determine the validity of any regulation or order that may be issued pursuant to the act. The price administrator is directed that, whenever in his judgment the price of a commodity has risen or threatens to rise to an extent inconsistent with the purposes of the act, he may by regulation or order establish such maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the act.

He must make adjustments for such relevant factors as he may determine and deem to be of general applicability, including speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity during and subsequent to the year ended October 1, 1941. Before issuing any regulation or order, he is required, so far as

practicable, to advise and consult with representative members of the industry which will be affected by such regulation or order. If after a maximum price has been established a substantial portion of the industry affected requests it, the administrator must appoint an industry advisory committee of such number as to be truly representative of the industry and from time to time at its request advise and consult with it with respect to the regulation or order, the form thereof, and classifications, differentiations, and adjustments therein.

The act is not to be construed as affecting the use of trade and brand names or as authorizing the administrator to require the grade labeling of any commodity or to standardize it, unless no practicable alternative exists to secure effective price control thereof, or as authorizing any order fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, with certain exceptions not material. Nothing in the act is to be construed to require any person to sell any commodity.

The respondent contends that the courts of this state are without jurisdiction to determine the validity of the order of the administrator, because of the exclusive jurisdiction given to the emergency court of appeals created by the act, but, as pointed out by the attorney general, this question is only incidentally involved. We find it unnecessary to pass upon either the constitutionality of the act as applied to the state of Washington or our right to consider the validity of the order, as we think the act is open to construction as to whether it applies to the situation we have before us.

In defining the term "person," § 942 (h), of the act provides that it shall include "an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its

political subdivisions, or any agency of any of the foregoing. "If the state of Washington is covered by the act it is because of the words "or any other government."

[2] We have adopted the rule that, "Where the language of a statute is transparent, and its meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe." *Smith v. Department of Labor & Industries*, 8 Wn. (2d) 587, 593, 113 P. (2d) 57. See *Ernst v. Kootros*, 196 Wash. 138, 82 P. (2d) 126; *Shelton Hotel Co. v. Bates*, 4 Wn. (2d) 498, 104 P. (2d) 478.

[3] There are statutes, however, in which their wording may be plain, but it may appear from such wording that a given statute may be applied in different ways, or some of the words may be susceptible of different meanings, and if applied, or the words are used in a certain way, the statute would be unconstitutional, or a grave doubt as to its validity would be raised. In such cases the rule is that, where a statute is open to two constructions, one of which will render it constitutional and the other unconstitutional or open to grave doubt in this respect, the former construction and not the latter is to be adopted. *State ex rel. Campbell v. Case*, 182 Wash. 334, 47 P. (2d) 24; *State ex rel. Dept. of Finance, Budget and Business v. Thurston County*, 199 Wash. 398, 92 P. (2d) 234.

In *United States v. Standard Brewery*, 251 U. S. 210, 64 L. Ed. 229, 40 S. Ct. 139, it is stated, p. 220:

"Furthermore, we must remember in considering an act of Congress that a construction which might render it unconstitutional is to be avoided. We said in *United States v. Jin Fuey Moy*, 241 U. S. 394, 401: 'A statute must be construed, if fairly possible, so as avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'"

This rule has been followed in *United States v. LaFranca*, 282 U. S. 568, 75 L. Ed. 551, 51 S. Ct. 278, and

United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 77 L. Ed. 175, 53 S. Ct. 42.

[4] We think the latter rule is applicable here. The whole history of congressional legislation and its interpretation by the United States supreme court indicates a studied effort to avoid encroachments upon the rights and prerogatives of the several states, especially with reference to their governmental functions, and to limit the application of the legislation to the citizens, or if applicable to the state at all, then only with reference to its proprietary status. *South Carolina v. United States*, 199 U. S. 437, 50 L. Ed. 261, 26 S. Ct. 110; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 70 L. Ed. 384, 46 S. Ct. 172; *Florida v. United States*, 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119.

In the *South Carolina* case, it said, p. 448:

"We pass, therefore, to the vital question in the case, and it is one of far-reaching significance. We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme; and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty."

In the *Metcalf* case, p. 523:

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax [citing authorities] or the appropriate exercise of the functions of the government affected by it."

And in *Florida v. United States*, p. 211:

"The question in the present cases, then, is not one of authority, but of its appropriate exercise. The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear."

A very clear and concise statement appears in 11 Am. Jur., Constitutional Law, p. 870, § 174:

"Among the matters which are implied in the Federal Constitution, although not expressed therein, is that the National Government may not, in the exercise of its powers, prevent a state from discharging its ordinary functions of government. This corresponds to the prohibition that no state can interfere with the free and unembarrassed exercise by the Federal Government of all powers conferred upon it. In other words, the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other. Therefore, whenever the Federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the Federal power must clearly appear."

[5] With the foregoing as a preface, we must look to the act itself and consider the status of the timber upon which the price has been fixed in aid of a determination as to whether it can be said that Congress intended the act should apply to the state of Washington.

It will be observed from a critical reading of the act that it relates primarily to those who buy and sell in the ordinary course of business those articles or commodities that are the ordinary subjects of sale and purchase, and also that the administrator in determining a proper price must consider certain commercial factors and consult those engaged in industry. The state of Washington in its ownership of granted school lands does not fall within this category. It owns and holds them in its sovereign, as distinguished from its proprietary, capacity, and in aid of

the performance of its governmental function of education. Any sale of such lands or of the timber apart from the land is not a commercial transaction, but is an exercise of one of its governmental prerogatives to secure funds to carry on its governmental function of educating its people through its common schools. If it were the intention of Congress that the act should apply to the state in its sovereign and governmental capacity, then a grave constitutional question would exist, even though the act is a war measure.

It is universally recognized that, under the war powers given to it by the constitution, Congress may enact all needful laws in aid of the successful prosecution of a war. So broad are its powers in this respect that no attempt has been made to define any limitation thereof, but in *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 64 L. Ed. 194, 40 S. Ct. 106, it is said, p. 156:

"The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations."

This authority was cited in the recent case of *Boicles v. Willingham*, 321 U. S. 503, 88 L. Ed. 626, 64 S. Ct. 641, and it was said, p. 521:

"We fully recognize, as did the Court in *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 426, that 'even the war power does not remove constitutional limitations safeguarding essential liberties.'"

It would therefore seem that it may be said that a grave doubt exists as to whether Congress, in enacting a war measure relating to the fixing of prices at which commodities may be sold, has the power to make it applicable to a state with reference to property it owns and holds for the purpose of carrying on its governmental functions.

The act does not clearly and specifically grant to the administrator the power to fix prices for timber grown on state school lands, nor does it clearly and specifically include in the definition of the word "person" a state in its governmental capacity, and in construing the act the

courts should not extend it to so provide. We think this is a proper deduction to be made and that it is but stating the converse of what was said by the court in *United States v. Montana*, 134 F. (2d) 194 (certiorari denied, 319 U. S. 772, 87 L. Ed. 1720, 63 S. Ct. 1438), with reference to the enabling act, p. 196:

"The language of the enabling act prohibits the state from disposing of school lands except at public sale after advertising. Since it does not clearly and specifically prohibit the United States from condemning the lands, we should not extend the prohibition to the United States."

This embodies the idea we have heretofore referred to that in enacting legislation Congress avoids so far as is possible anything that may bring national and state sovereignty into conflict.

In the cases cited by respondent, it appears that the property involved was owned by the state or other public body in a proprietary capacity. In *California v. United States*, 320 U. S. 577, 88 L. Ed. 255, 64 S. Ct. 352 (*City of Oakland v. Same*), California and Oakland had stepped aside from their governmental functions and had gone into competition with private industry in providing facilities for use by water borne traffic, and it was held that they were subject to orders made by the maritime commission. In the case from the district court of Idaho cited in the respondent's brief, a county owned a tractor which it sold at public auction, and it was held by that court that an office of price administration regulation applied. The ruling was apparently based upon the theory that the county owned the tractor in its proprietary capacity and was amenable to the act.

We are satisfied upon a consideration of the wording of the act, the course of conduct required of the administrator in fixing prices, the status of granted state school lands, and the relationship that exists between national and state sovereignties, that Congress in enacting the emergency price control act did not intend that it should apply to a state in respect to property owned in its gov-

ernmental capacity. It therefore follows that, in selling timber grown on state school lands, the commissioner of public lands must do so in accordance with the enabling act and the constitution and statutes of the state of Washington, irrespective of any order or regulation of the office of price administration.

If the United States requires the timber in question in aid of its war efforts, it has the power to secure it by eminent domain proceedings which are direct and summary. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508, 35 L. Ed. 1487, 61 S. Ct. 1050; *United States v. Montana*, *supra*. By this method the power of the Federal government would be exercised in a constitutional manner, and the state would receive just compensation for its timber arrived at by a competent tribunal as contemplated by the constitution.

The other questions raised and discussed in the briefs and oral arguments are incidental to those upon which we have based our decision and need not be further considered, and, in view of the disposition we have made of the application for a writ of mandamus, it is unnecessary that any declaratory judgment be made.

The judgment is reversed and the case remanded to the lower court, with instruction to dismiss the actions brought by the respondent.

SIMPSON, C. J., BEALS, and JEFFERS, JJ. concur.

MILLARD, J. (concurring in the result).—It is *petitio principii* to invoke rule of ambiguity. Congress clearly intended to include the sovereign states within the purview of the enactment. Doing so, Congress unconstitutionally acted; therefore, we may disregard the statute. Congress cannot constitutionally invest the OPA or any other tribunal with powers claimed by that bureau. Though at war, let us hold as securely as we may the constitutional safeguards. The Federal government's encroachment on state sovereignty should be challenged.

BLAKE, J. (dissenting).—I presume that no one would deny that the delegation by the states to Congress of the power to declare war carries with it the delegation of the power to wage war effectively. That the emergency price control act of 1942 is a war measure enacted by Congress pursuant to this power delegated by the states, cannot be doubted in the light of what was announced by Mr. Justice Sutherland, speaking for the court in *United States v. Macintosh*, 283 U. S. 605, 622, 75 L. Ed. 1302, 51 S. Ct. 570:

"From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams.—This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life. To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment, or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war." (Italics mine.)

Being a war measure, the emergency price control act of 1942 is the supreme law of the land, before which state constitutions and state laws must bow under the express provisions of Art. VI of the Federal constitution, which, so far as pertinent, provides:

"This constitution, and the laws of the United States which shall be made in pursuance thereof, shall

be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." (*Italics mine.*)

Of the supremacy accorded acts of Congress under Art. VI, Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. (22 U. S.) 1, 6 L. Ed. 23, said, p. 209:

"Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several states,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. This opinion has been frequently expressed in this court, and is founded, as well on the nature of the government, as on the words of the constitution. In argument, however, it has been contended, that if a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it.

"The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interfere

with, or are contrary to, the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." (Italics mine.)

Now, by § 204 subd. (d) of the act, in order to insure uniformity and equality in the application and administration of the act, Congress set up an emergency court of appeals, with "exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206; and of any provision of any such regulation. . . ." Further to insure uniformity and equality in administration and application of the act and regulations made under it, the same section, subd. (d), further provides:

"Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision." (Italics mine.)

Now, this act, pursuant, as it is, to the power to declare and wage war delegated by the states to Congress, is the supreme law of the land—"anything in the constitution or laws of [this] state to the contrary notwithstanding." So, if the scope of the emergency price control act includes state governments, the appellant and the respondents are equally bound to abide by the order made by the price administrator fixing a ceiling price on timber sold separately from the land.

That a state government comes within the purview of the act, is manifest by the definition of "person" contained in § 302 (h) (U. S. C. A. (Sup.), § 942 (h)). If

state governments are not included within the term "any other government," then no political subdivision of any state nor any state agency comes within the purview of the act, for, obviously, the political subdivisions and agencies "of the foregoing" are such as are set up and included within "any other government" within the scope of the act.

To say that the act permits of the fixing of a ceiling price on state timber, does not mean that the state *must* sell at such price. The order fixing the ceiling price does not so provide. Nor does the act authorize any such procedure. Of course, neither the state nor a private individual can be forced to part with its or his property except under the power of eminent domain. But Congress, in mobilizing the nation's economy, in furtherance of effective prosecution of the war, can say to the state and to its citizens that property shall not be bought or sold above a fixed price.

While it may be beside the issues presented to say so, I think it is apparent that the emergency price control act and the regulations made pursuant to it are part of the attempt of Congress to put war economy, so far as possible, on a "pay as you go" basis, for every rise in price in materials adds to the cost of the war and increases the national debt, the burden of paying which will largely fall on those who are doing the fighting.

Whether the order fixing a ceiling price on timber is arbitrary or unreasonable, is not for this court to say. Congress, in the valid exercise of a delegated power, has committed that question to the emergency court of appeals for determination. It is my view that all these actions should be dismissed—the declaratory judgment actions because this court is without jurisdiction to decide the issues presented, and the mandamus action because the appellant is not bound to sell state timber at the ceiling price.

STEINERT, J.—(dissenting)—I think that the judgment of the trial court should be affirmed specifically upon the grounds that, in adopting the emergency price control act (56 Stat. 23, 50 U. S. C. A. (Sup.), § 901 et seq.), the Congress clearly, properly, and rightly exercised its constitutional power and authority to prescribe commodity prices, *as a war emergency measure*, and that the act is to be regarded strictly as such a measure.

ROBINSON, J., concurs with STEINERT, J.

MALLERY, J. (concurring in the result)—I think that Congress included the sovereign states within the purview of the act and that as a war measure it had the power to do so. It did not attempt to repeal, amend, or suspend the state law prescribing the method of selling state timber. This results in an impasse. The land commissioner cannot sell state timber at a price above the ceiling. If there are two or more bids at the ceiling price or higher, he cannot sell at all, because the state law requiring that sales be made only to the highest bidder precludes any other method of ascertaining a successful bidder. This ties the commissioner's hands and freezes the timber. The Federal government alone has the choice of going forward by removing the ceiling prices or exercising its right of eminent domain.

In any event, mandamus will not lie to compel the land commissioner to make a sale in violation of law.

NOV 15 1945

CHARLES ELMORE DODLEY
CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1945

NO. 261

OTTO A. CASE, as Commissioner of Public Lands of the
State of Washington, Petitioner,

v.

CHESTER BOWLES, Administrator, Office of Price Ad-
ministration, and SOUNDVIEW PULP COMPANY,
a Washington corporation, Respondents.

ON CERTIORARI
TO REVIEW THE DECISION OF THE UNITED
STATES CIRCUIT COURT OF APPEALS,
NINTH CIRCUIT

BRIEF OF PETITIONER WITH APPENDICES

SMITH TROY,

Attorney General, State of Washington.

R. A. MOEN,

Assistant Attorney General, State of Washington.

EDWIN C. EWING,

Assistant Attorney General, State of Washington.

Attorneys for Petitioner.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1945

NO. 261

OTTO A. CASE, as Commissioner of Public Lands of the
State of Washington, Petitioner.

v.

CHESTER BOWLES, Administrator, Office of Price Ad-
ministration, and SOUNDVIEW PULP COMPANY,
a Washington corporation, Respondents.

ON CERTIORARI
TO REVIEW THE DECISION OF THE UNITED
STATES CIRCUIT COURT OF APPEALS,
NINTH CIRCUIT

BRIEF OF PETITIONER WITH APPENDICES

SMITH TROY,
Attorney General, State of Washington.

R. A. MOEN,
Assistant Attorney General, State of Washington.

EDWIN C. EWING,
Assistant Attorney General, State of Washington.
Attorneys for Petitioner.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

SUBJECT INDEX

	Page
I. Opinion of Courts Below	9
II. Jurisdiction	11
III. Statement of the Case	12
IV. Specification of Errors	19
V. Statutes	20
VI. Summary of Arguments	21
A. Jurisdictional Features	21
B. Emergency Court of Appeals	23
C. On the Merits	24
VII. Argument	26
Point A. The Attorneys Appointed by the Price Administrator Are Not Authorized to Institute Actions for the United States Independent of the Department of Justice	26
Point B. United States Supreme Court Has Exclusive and Original Jurisdiction of this Case	31
Point C. If the District Court Does Have Jurisdiction It May Be Exercised Only by a Three Judge Court	38
Point D. This Court May Determine Whether States Are Included in the Price Control Act Even Though the Subject Regulation Has Never Been Challenged in the Emergency Court of Appeals	42
Point E. Congress Never Intended the Emergency Price Control Act to Apply to States	48
Point F. If the Price Control Act Includes the States It Does Not Apply to a Sale of School Grant Timber	59
Point G. If the Act Intended to Include the Instant Sale It Is Unconstitutional in Its Operational Effect	67
VIII. Conclusion	71
Appendices following Brief	
Appendix A—Price Control Act	1
Appendix B—M. P. R. 460	19
Appendix C—Enabling Act	26
Appendix D—State Constitution	28
Appendix E—State Statutes	32
Appendix F—Federal Statutes	34

TABLE OF CASES CITED

	Page
Allen v. Regents of University System, 304 U. S. 439.....	68, 69
Beecher v. Wetherby, 95 U. S. 517.....	62
Board of Trustees v. State of Indiana, 55 U. S. 268.....	64
Bowles v. Bonnie Bee Shop, 55 F. Supp. 754.....	42
Bowles v. Inland Empire Dairy Assn., 53 F. Supp. 210.....	66
Bowles v. Good Luck Glove Company, 148 F. (2d) 579.....	43
Bowles v. Nu Way Laundry Company, 144 F. Supp. 741.....	42
Bowles v. Willingham, 321 U. S. 503.....	42, 47, 70
Bowles v. Texas Liquor Control Board, 59 F. Supp. 681, rev. 148 F. (2d) 265.....	49
Brown v. Texas Liquor Control Board, 54 F. Supp. 350, aff. 146 F. (2d) 135.....	49
Burnett v. Coronado Oil & Gas Co., 285 U. S. 393.....	68
California v. U. S., 220 U. S. 577.....	68
Carter v. Carter Coal Co., 298 U. S. 238.....	70
Central Railroad Company of New Jersey v. Martin, 115 F. (2d) 968, cert. den. 313 U. S. 569.....	32
City of Trent v. Robertson, 125 Miss. 31, 87 So. 464.....	63
Cohen v. U. S., 38 App. D. C. 123.....	28
Collector v. Day, 11 Wall. 113.....	68
Confiscation Cases, 74 U. S. 454.....	25
Connecting Gas Company v. Imes, 11 F. (2d) 191.....	39
Cooper v. Roberts, 59 U. S. 173.....	62
Cumberland Tel. and Tel. Co. v. Louisiana Public Service Com- mission, 260 U. S. 212.....	40
Davies Warehouse Company v. Bowles, 321 U. S. 144.....	46, 53
Downs v. Bidwell, 182 U. S. 244.....	50
Eidman v. Martinez, 184 U. S. 578.....	50
Ex parte Ayres, 123 U. S. 443.....	32
Ex parte Keller, 185 S. C. 283, 194 S. E. 15.....	64
Ex parte New York, 256 U. S. 490.....	32
Ex parte Virginia, 100 U. S. 339.....	50
Farmers' Gin Co. v. Hayes, 54 F. Supp. 43.....	41, 46
Florida v. United States, 282 U. S. 194.....	69
Ford Motor Company v. Department of Treasury (Ind. 323 U. S. 459).....	32
Great Northern Life Insurance Company v. Read, 322 U. S. 47.....	32
Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 156.....	69
Head Money Cases, 112 U. S. 580.....	65
Hecht Co. v. Bowles, 321 U. S. 321.....	45, 47
Helvering v. Gerhardt, 304 U. S. 405.....	68, 69
Helvering v. Producers Corp., 303 U. S. 376.....	68
Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398, 426.....	70

TABLE OF CASES CITED—Continued

	Page
Lane County v. Oregon, 7 Wall. 71.....	71
Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310.....	40
McGee v. Mathis, 71 U. S. 143.....	64
Metcalf v. Eddy, 269 U. S. 514.....	68, 69
Michigan Central Railroad Company v. Michigan Public Utility Commission, 271 Fed. 319.....	39
Newton v. State Board of Land Commissioners, 37 Ida. 38, 219 Pac. 1053.....	63
Penn Dairies v. Milk Control Commission, 318 U. S. 261.....	52
People v. Black (Cal.), 54 Pac. 385.....	50
Perry v. United States, 28 Ct. Cl. 485.....	30
Philips v. U. S., 312 U. S. 246.....	40
Pollock v. Farmers Loan & Trust Co., 157 U. S. 429.....	68
Query v. U. S., 316 U. S. 486.....	23, 40, 41
Riss and Company v. Hoch, 99 F. (2d) 553.....	39
Rottenberg v. U. S., 321 U. S. 414.....	44
Sloan v. Blytheville Special School District No. 5, 169 Ark. 77; 276 S. W. 397.....	63
Soundview Pulp Company v. Taylor, 21 Wn. (2d) 261; 150 P. (2d) 839.....	10, 14, 32, 40, 48, 68
South Carolina v. U. S., 199 U. S. 437.....	69
Speicher v. Sowell, CCH War Law Service, Price 4; I Price Con- trol Cases 51,000, aff. in 309 Mich. 54; 14 N. W. (2d) 651.....	43, 48, 55
State v. Whitney, 66 Wn. 473, 120 P. 116.....	63
Sutherland v. International Insurance Co. of New York, 43 F. (2d) 969.....	21, 28
Texas v. White, 7 Wall. 700 (84 U. S. 700).....	49
The Cherokee Tobacco, 78 U. S. 616.....	65
The Chinese Exclusion Cases, 112 U. S. 536, 130 U. S. 581.....	65
Twin Falls County v. Hulbert, 156 P. (2d) 319.....	48, 51
Union and Mercantile Trust Co. v. Harnwell, 158 Ark. 295, 250 S. W. 321.....	64
U. S. v. California, 297 U. S. 175.....	35
U. S. ex rel. Miller, Alien Property Custodian, v. Clausen, 291 F. 231; 293 F. 195, 266 U. S. 641.....	33
U. S. v. Doughty, 7 Blatch. 424, 25 Fed. Cases No. 14,986.....	27
U. S. v. Jacinto Tin Company, 125 U. S. 273.....	28
U. S. v. McAvoy, 4 Blatch. 418, Fed. Cases No. 15,654.....	27
U. S. v. Morris, 10 Wheaton 246.....	27
U. S. v. 1860 acres of land in Riverside County, 54 F. Supp. 867.....	27, 28
U. S. v. Stowel, 27 Fed. Cases 1350, No. 16409.....	27
Worcester County Trust Co. v. Riley, 362 U. S. 292.....	32
Yakus v. U. S., 321 U. S. 414.....	42, 45, 47

TABLE OF STATUTES, CONSTITUTIONAL PROVISIONS AND ADMINISTRATIVE REGULATIONS CITED

Federal Constitution	Page
Article III, section 2, clause 2	19, 22, 32
5th Amendment	25
10th Amendment	25
Federal Statutes	
Judicial Code, section 129 (36 Stat. 1134; 28 U. S. C. 227)	11
Judicial Code, section 233 (36 Stat. 1156; 28 U. S. C. 341)	15, 19, 22, 23, 32, 37
Judicial Code, section 240 (43 Stat. 938; 28 U. S. C. 347a)	11
Judicial Code, section 266 (43 Stat. 938; U. S. C. 380)	15, 19, 22, 38
Shipping Act of 1916, section 3 (41 Stat. 989)	28
28 U. S. C., section 485, R. S. 771	27, 30
5 U. S. C., sections 308-312; R. S. 358, 359; 34 Stat. 816; R. S. 360, R. S. 363	30
Enabling Act (25 Stat. L. 676)	60, 61, 67
Section 10	12, 60
Section 11	60, 64
Section 13	60
Section 14	60
Organic Act (Act of Congress, dated March 2, 1853)	59
Section 20	59
Emergency Price Control Act (Pub. L. 421, 77th Cong., 2nd Sess., C. 26, 56 Stat. 23, 50 U. S. C. App. 901, et seq., as amended by Stabilization Extension Act of 1944, Pub. L. 383, 78th Cong., 2nd Sess.)	
Section 1-C	49
Section 2 a	54
Section 2 d	54
Section 2 e	52, 54
Section 2 h	54
Section 4 d	26
Section 201 a	28, 30
Section 204 d	34, 42, 47
Section 205 a	11, 34
Section 205 b	34
Section 205 c	11, 34
Section 205 f	55
Section 302 c	45
Section 302 h	50

TABLE OF STATUTES, CONSTITUTIONAL PROVISIONS AND ADMINISTRATIVE REGULATIONS CITED—Continued

State Constitution	Page
Article 3, section 1	31
Article 9, section 1	61
Article 9, section 3	61
Article 16, section 1	61
Article 16, section 2	16, 40, 61, 64
Article 16, section 3	61
Maximum Price Regulation 460	12, 13, 14, 16, 19, 34, 41, 68, 71
Executive Order No. 9250	13
Statement of Considerations	
7 Fed. Reg. 7871	57
8 Fed. Reg. 4681	57

TEXT BOOKS AND ENCYCLOPEDIA CITED

11 American Jurisprudence, p. 870, section 174	68
Books of Instructions to U. S. Attorneys, Marshals, Clerks and Commissioners	29
50 Corpus Juris 963, section 162	62
59 Corpus Juris 1103, section 653	50
49 Harvard Law Review, 1375	37
Mecham on Sales, Volume 1, section 10	64
21 Opinions U. S. Attorney General 195	26
32 Opinions U. S. Attorney General 276	28

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1945

NO. 261

OTTO A. CASE, as Commissioner of Public Lands, of the
State of Washington, Petitioner,

v.

CHESTER BOWLES, Administrator, Office of Price Ad-
ministration, and SOUNDVIEW PULP COMPANY,
a Washington corporation, Respondents.

ON CERTIORARI
TO REVIEW THE DECISION OF THE UNITED
STATES CIRCUIT COURT OF APPEALS,
NINTH CIRCUIT

BRIEF OF PETITIONER WITH APPENDICES

I.

OPINIONS BELOW

The oral decision of the United States District Court
for the Western District of Washington, Southern Divi-
sion, is not reported but appears in the transcript of the
record commencing on page 56 (R. 56-62).

The opinion of the Circuit Court of Appeals for the Ninth Circuit reversing the judgment of the District Court and which is here being reviewed, is reported in 149 F. (2d) 777, and appears in the transcript of the record commencing on page 71. (R. 71-77).

The opinion of the Washington Supreme Court, which preceded institution of this action in the Federal courts and which is contrary to the opinion of the Circuit Court, is reported in 21 Wn. (2d) 261; 150 P. (2d) 839, and is reprinted as Appendix G to the Petition for Certiorari.

II.

JURISDICTION

The Price Administrator instituted this suit in the appropriate District Court, relying on Section 205(a) of the Emergency Price Control Act of 194. (R. 2-6), contending that jurisdiction of the District Court was properly invoked under Section 205(c) of said act (Pub. L. 421, 77th Cong., 2nd Sess.; c. 26, 56 Stat. 23, 50 U. S. C. Appendix 901; *et seq.*, as amended by the Stabilization Extension Act of 1944, Pub. L. 383, 78th Cong., 2nd Sess.).

The judgment of the District Court was entered August 21, 1944 (R. 38-41). The Price Administrator filed Notice of Appeal on September 14, 1944 (R. 41-42) by virtue of Section 129 of the Judicial Code (28 U. S. C., Sec. 227, 36 Stat. 1134).

The jurisdiction of this Court is invoked by virtue of Sec. 240 of the Judicial Code (28 U. S. C., Sec. 347(a), 43 Stat. 938). The decree of the Circuit Court was filed and entered May 28, 1945 (R. 77, 78). An order staying issuance of the Circuit Court's mandate was obtained and entered June 18, 1945 (R. 80.). A petition for certiorari was filed and docketed in this Court on July 26, 1945, and a writ of certiorari to the United States Circuit Court of Appeals, Ninth Circuit, was ordered October 15, 1945.

III.

STATEMENT OF THE CASE

The facts in this case are not in dispute and may be summarized as follows:

On September 15, 1943, the Western Log and Lumber Administrator of the War Production Board issued a directive to the Commissioner of Public Lands of the State of Washington to sell the timber on the South one-half of Section 36, Township 36 North, Range 5 East, W. M., Skagit County, Washington, which timber was acquired by the State of Washington under Section 10 of the Enabling Act (25 Stat. L. 676), and is owned by the State in trust for school purposes (R. 21). In an effort to comply with the directive the timber on the entire section was offered for sale at public auction and the sale was held on November 23, 1943 (R. 21). Two companies, namely, Coos Bay Corporation and Soundview Pulp Company, submitted competing bids, the highest bid being offered by the Soundview Pulp Company in the sum of \$86,336.39 (R. 21).

Immediately after receiving the bids and on the very same day the Commissioner of Public Lands advised the Seattle Office of the Price Administrator and the Regional Office of the War Production Board that the sale had resulted in bids in excess of the ceiling price as computed under Maximum Price Regulation, 460, and requested those officials to suggest a proper course of procedure. The officials of the War Production Board insisted that the sale must be completed and the officials in the Price Administrator's office insisted that the sale could not be completed for an amount in excess of \$77,853.25, the

maximum price for the timber computed under the terms of Maximum Price Regulation 460 (R. 9).

The Land Commissioner thereupon advised the Seattle Office of the Price Administrator and both bidders at the sale that he had been advised and believed that Maximum Price Regulation 460 was not applicable to sales made by a sovereign state of school grant timber, and that the laws of the State of Washington and of the United States compelled him to complete the sale in the highest bidder at the price bid, and issue to that company a bill of sale for the timber (R. 22). The Seattle Office of the Price Administrator thereupon informed the Soundview Pulp Company that their bid was in excess of the maximum ceiling price and that if said sale were consummated on said bid the Price Administrator would hold the Soundview Pulp Company responsible for violation of the Emergency Price Control Act of 1942, Executive Order No. 9250, and Maximum Price Regulation 460 (R. 22).

On December 1, 1943, the Soundview Pulp Company commenced an action in the Superior Court of the State of Washington for Thurston County praying for an injunction prohibiting the Land Commissioner from confirming the sale or issuing a bill of sale to the timber until the legality of their bid could be determined, and asking for a declaratory judgment of the rights, status and legal obligations between the parties. On December 4, 1943, Coos Bay Pulp Corporation, the other bidder at the sale, also commenced an action in the same court seeking to compel a completion of the sale in the Coos Bay Pulp Corporation, on the theory that that company had bid the exact ceiling price while in the process of submitting

alternating competing bids, and that all bids submitted by both parties in excess of the ceiling price were illegal. On December 6, 1943, Coos Bay Pulp Corporation filed a third action in the same court praying for an injunction to prohibit the Land Commissioner from completing the sale at a price in excess of the maximum ceiling price, as computed under the provisions of Maximum Price Regulation. 460 (R. 23).

All three actions were consolidated for trial and after a hearing on the merits the Court concluded that the state was bound by the directive of the War Production Board and was bound by the Maximum Price Regulation, and judgment was entered requiring the Land Commissioner to complete the sale in Coos Bay Pulp Corporation at the ceiling price. From this judgment an appeal was taken by the Land Commissioner to the Supreme Court of the State of Washington, which in due course and on July 22, 1944, reversed the judgment of the lower court, the Washington Supreme Court holding that the Emergency Price Control Act was not applicable to the sale in question or to any other sales of timber made by the State of Washington in the performance of its governmental functions (*Soundview Pulp Company v. Taylor*, 21 Wn. (2d) 261; 150 P. (2d) 839; reprinted as Appendix G to Petition for Certiorari).

Before judgment could be entered, in conformance with said opinion, the Price Administrator, on July 28, 1944, commenced this action to secure a temporary restraining order and permanent injunction by filing his Complaint (R. 2-6), Motion for Preliminary Injunction and Temporary Restraining Order (R. 7-8), and his supporting affidavit (R. 8-10) in the District Court for the

Western District of Washington, Southern Division. A temporary restraining order was entered with order to show cause why it should not be made permanent (R. 12-14).

The defendant, Commissioner of Public Lands, on August 8, 1944, filed a motion to dismiss the case and dissolve the temporary restraining order (R. 17-19) for reasons, among others, which included:

1. The complaint failed to state a cause of action upon which relief could be granted.

2. The District Court would not have jurisdiction over the subject matter or person of the defendant, Commissioner of Public Lands, for the reason that Sec. 233 of the Judicial Code (28 U. S. C. Sec. 341, 36 Stat. 1156) vests exclusive jurisdiction in cases of this kind in the Supreme Court of the United States.

3. If the District Court had jurisdiction, it could only be exercised by a three-judge court, as provided for by Sec. 266 of the Judicial Code (28 U. S. C., Sec. 380).

4. Neither the complaint for injunction, nor the affidavit in support of the motion for temporary restraining order, alleged any authorization to the attorneys who were purporting to represent the Price Administrator, nor were the pleadings signed by the Attorney General of the United States, or by any officer of the Department of Justice, as required by law.

On August 8, 1944, the Commissioner of Public Lands also filed a motion to convene a three-judge court (R. 16), as provided by Sec. 266 of the Judicial Code (28 U. S. C. 380, 43 Stat. 938) for the reason that this suit was one to

enjoin enforcement of Art. 16, Sec. 2, of the Washington State Constitution and the Statutes of the State of Washington relating to sale of state-owned timber.

On August 8, 1944, the Commissioner of Public Lands also filed an answer admitting the facts pleaded in the complaint, but denying that Maximum Price Regulation 460 had any application to the sale in question.^① By way of further answer, the Land Commissioner also alleged the facts as heretofore set forth herein, and pleaded three affirmative defenses (R. 26), as follows:

1. That the Emergency Price Control Act did not by its terms or intent apply to sales made by a sovereign state in the performance of its governmental functions.

2. That if the Emergency Price Control Act authorized the issuance of Maximum Price Regulation 460, then the Price Control Act was unconstitutional in its operational effect because it violated the 5th and 10th Amendments to the Federal Constitution.

3. That the Emergency Price Control Act expressly stated "that no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency," and inasmuch as the Price Administrator is seeking to enjoin the Commissioner of Public Lands, acting in his official capacity as an officer of the State of Washington, the Administrator is seeking a remedy against the State of Washington which, by the terms of the Act itself, is denied plaintiff.

^① The Answer of the Land Commissioner also sets forth four other sales which had resulted in over the ceiling bids. (R. 25.) These sales have all since been mutually rescinded and the purchase price refunded to the bidders.

On August 11, 1944, the Price Administrator filed a motion to strike the three affirmative defenses set forth in the answer of the defendant, Commissioner of Public Lands, on the ground of their immateriality and failure to constitute a defense to the complaint (R. 33-34).

The defendant, Soundview Pulp Company, on August 11, 1944, filed a separate answer, indicating that this defendant did not desire to engage in any dispute with the Price Administrator on any issue of law or fact, but desired merely that the matters involved be adjudicated, inasmuch as that defendant was "still in doubt as to its rights, status and legal relations with the State of Washington and the United States Government as they are affected by the Constitution and statutes of the State of Washington, and the statutes, orders and regulations of the United States, and desired only to act in a legal manner as a court of competent jurisdiction shall declare those rights." (R. 27-33.)

A full hearing of the cause on the merits was held before the District Court on August 11, 1944. The parties admitted in open court that the facts alleged in the complaint and answers were correct and the only questions before the court were issues of law (R. 54). The court, in a series of preliminary rulings, overruled the jurisdictional contentions of the Commissioner of Public Lands (R. 39) and held on the merits of the case that the Emergency Price Control Act had not authorized the Price Administrator to promulgate maximum price regulations applicable to the sale in question (R. 56-64) and entered judgment dissolving the temporary restraining order and dismissing the complaint (R. 39-40).

On September 14, 1944, the Price Administrator appealed the District Court decision to the Circuit Court of Appeals, which Court on May 28, 1945, reversed the decision of the District Court and decreed that the Price Administrator was entitled to an injunction prohibiting the Land Commissioner and the Soundview Pulp Company from consummating the sale (R. 77-78).²

On October 15, 1945, this Court granted certiorari to review the Circuit Court decision.

² While this case was pending appeal in the Circuit Court of Appeals, Jack Taylor, Commissioner of Public Lands of the State of Washington, the original defendant in this case, was succeeded in office by Otto A. Case, the Petitioner herein, who was thereupon substituted as the party defendant to this action. (R. 68-69.)

IV.

SPECIFICATION OF ERRORS

A. The Circuit Court of Appeals Erred in Holding:

1. That the Emergency Price Control Act is applicable to states.

2. That the Price Administrator is authorized to issue maximum price regulations superseding and setting aside the compact between the United States and the State of Washington granting lands to the state to be held in trust for educational purposes.

3. That Maximum Price Regulation 460 and the Emergency Price Control Act, when so construed, are constitutional.

4. That a Federal District Court has jurisdiction to enjoin a sovereign state from a threatened violation of a maximum price regulation, notwithstanding the provisions of Art. III, Sec. 2, of the United States Constitution and Sec. 233 of the Judicial Code (36 Stat. 1156, 28 U. S. C. 341), vesting original and exclusive jurisdiction of all controversies of a civil nature in which a state is a party in the Supreme Court of the United States.

5. That the District Court has authority to enjoin a sovereign state from carrying out a sale of its land grant timber in accordance with its constitutional and statutory mandates, notwithstanding the provisions of Sec. 266 of the Judicial Code (43 Stat. 938, 28 U. S. C. 380), prohibiting the issuance of an injunction restraining a state officer in the enforcement or execution of a state statute on the grounds of unconstitutionality of the state statute, without convening a three-judge court.

6. That the attorneys appointed by the Price Administrator are authorized to commence actions on behalf of the United States, independent of the Department of Justice.

B. The Circuit Court of Appeals Erred in Entering Its Decree Reversing the Judgment of the District Court. (R. 77-78.)

V.

STATUTES

The pertinent provisions of the Federal Statutes, including the Enabling Act, the Emergency Price Control Act of 1942, as amended, and Maximum Price Regulation 460, as well as the pertinent provisions of the State Constitution and the state statutes necessary to a proper determination of the issues in this case are all set forth as appendices to this brief.

VI

SUMMARY OF ARGUMENT

A. Jurisdictional Features

The District Court—and the Circuit Court and this Court on appeal—do not have jurisdiction of this case for the reason that the action was not commenced by the District Attorney or by any officer of the Department of Justice. The Attorney General, by statute, has control of all Federal litigation, both civil and criminal, and control includes their initiation as well as their subsequent conduct. It is a cardinal principle of statutory construction to construe statutes so as to give effect to all, and accordingly, the provisions of the Price Control Act authorizing the Price Administrator to apply to the courts for injunctions and enforcement orders merely entitles that officer to make such application through the government's regularly provided legal officers, to wit, the Department of Justice. The provisions of the Price Control Act authorizing the Price Administrator to hire attorneys who may represent him in court merely authorizes those attorneys to present the Administrator's interpretations after an action has been initiated in a proper manner by the legal officers in the Department of Justice. This construction was adopted in *Sutherland v. International Ins. Co.*, 2 Cir. 1930, 43 F. (2d) 969, which decision we rely on for authority. The question is jurisdictional, and if our contention is correct, this action will have to be dismissed.

Even though this Court should determine that the attorneys for the Price Administrator are authorized to commence actions independent of the Department of Jus-

tice, still the District Court—and the Circuit Court and this Court on appeal—do not have jurisdiction over the person of the defendant, Commissioner of Public Lands of the State of Washington, for the reason that that defendant is being sued in his official capacity as an officer of the State of Washington, and the Price Administrator is bringing this action in his official capacity as an officer of the United States. Hence this suit is in reality a civil action between the United States of America and the State of Washington, a sovereign state. Article III, Sec. 2, of the United States Constitution, and Sec. 233 of the Judicial Code (36 Stat. 1156, 28 U. S. C. 371) place jurisdiction in actions of this kind exclusively and originally in the United States Supreme Court.

If this Court determines that the District Court did have jurisdiction over the subject matter and the persons who are parties to this action, still that jurisdiction may be exercised by the District Court only when constituted as a three-judge court; as provided for in Sec. 266 of the Judicial Code (43 Stat. 933, 28 U. S. C. 380), for the reason that the Land Commissioner, when selling state timber, is required by the Constitution of the State of Washington, to sell that timber at public auction to the highest bidder, and the Price Administrator, in seeking this injunction, is attempting to enjoin the exercise of a constitutional duty enjoined upon the Land Commissioner by the statutes and the Constitution of the State of Washington. Sec. 266 of the Judicial Code prohibits a District Court from issuing an injunction enjoining the exercise of a state statute upon the grounds of unconstitutionality except when the District Court has convened a three-judge court. The requirement of a three-judge court is not a

mere privilege which the parties may waive, but is a jurisdictional requirement.

In *Query v. U. S.*, 316 U. S. 486, it was held that an action by the United States to restrain compliance with the terms of a state statute by state officers on the ground that the state statute was in conflict with a Federal act was a proper case for convening a three-judge court. That case is controlling here.

B. Emergency Court of Appeals

The District Court—and the Circuit Court and this Court on appeal—has authority to determine whether states are included within the Price Control Act, notwithstanding the fact that the Emergency Court of Appeals has never passed on the question for the reason that a determination of that question is essential to a determination of the District Court's jurisdiction over the person of the defendant, Commissioner of Public Lands. Sec. 233 of the Judicial Code (36 Stat. 1156, 28 U. S. C. 371) vests original and exclusive jurisdiction of all controversies of a civil nature in the United States Supreme Court. That statute is dispositive of this case unless the statute is impliedly repealed by the Price Control Act. Obviously, the statute can not be impliedly repealed unless states are included within the Price Control Act. Consequently, the question must be determined for the purpose of determining the Court's jurisdiction, and the Price Administrator's regulation—even though not challenged in the Emergency Court of Appeals—is not binding on the courts for the purpose of determining jurisdiction.

In any event, the Court to which application is made for an injunction to prohibit a threatened violation of a

maximum price regulation, must determine for itself whether the regulation is authorized by the Congressional Act under which the regulation is supposedly issued. The exclusive jurisdiction provisions of the Price Control Act extend protection only to regulations which are issued under the Act, and regulations not authorized are no more immune from review in courts other than the Emergency Court of Appeals than would be price regulations issued by strangers. Congress never intended that an equity court was duty-bound to issue injunctions merely at the demand of the Price Administrator without giving any consideration as to whether the regulation sought to be enforced by the Administrator was within the scope of the authority delegated by Congress.

C. On the Merits

Congress never intended the Emergency Price Control Act to apply to states for the reason that Congress failed to expressly include the states when passing the Price Control Act. Also, the entire tenor of the Act and its expressed purposes indicate that the Act is intended to apply to private sales made in the ordinary course of business, and not to public official sales. Congress' failure to expressly include the states is not to be lightly regarded in view of the history of the doctrine of states' rights, and the courts should not, by construction, make the Act applicable to states when Congress has not expressly done so.

Even if the Act is construed to include the states, such application would maintain only in those instances where the state is engaged in proprietary capacities as distinguished from its sovereign or governmental capacities. In the instant case, the state is attempting to sell

timber as an incident to the administration of its public school system. The timber which is here being sold was acquired by the State of Washington upon its admission into statehood by grant from Congress. One of the conditions upon which that grant was made is that the timber would never be sold except at public auction to the highest bidder. When the state adopted its constitution and accepted this term imposed by the Congressional grant, there arose between the state and the Federal Government a compact, or treaty. Even assuming that Congress has the power to abrogate its treaties, every presumption is against construing an act to effect such abrogation in the absence of clear, unequivocal and unambiguous language compelling that result. There is nothing in the Price Control Act which compels this result, and the Act should not be so construed.

In the event that this Court determines that the Price Administrator has the authority to set ceiling prices on commodities sold by the State, and such price regulations are applicable to sales of school grant timber, then that price regulation and the Emergency Price Control Act, when so construed, are unconstitutional as violative of the Fifth and Tenth Amendments of the Federal Constitution and the doctrine implied in the Federal Constitution that both the state and the federal governments shall exercise their respective powers in such a manner as not to interfere with the proper exercise of those powers possessed by the other.

VII. ARGUMENT

Point A. The Attorneys for the Price Administrator Are Not Authorized to Institute Actions for the United States Independent of the Department of Justice

Lest the Court feel that this assignment of error is without merit, may we first point out that in this action we have one governmental agency, the War Production Board, asserting its right to compel the state to sell the timber, and a second governmental agency, the Office of Price Administration, asserting its right to fix a maximum price for which that timber is to be sold. The officials of the War Production Board took no active part in this case, although requested to do so, and we are still at a loss to know by what authority they contend to have this right. Nevertheless, it is the fact that that agency has asserted and still asserts its authority to compel sales of state-owned timber, while the Price Administrator contends with equal vigor that he may fix ceiling prices on the very same timber. And these positions are taken notwithstanding the expressed policy of Congress contained in Sec. 4-d of the Price Control Act (50 U. S. C. App. Sec. 904 (d), 56 Stat. 28), that:

"Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

The state could not interplead the War Production Board into this action as that board is merely an agency of the United States Government, who is already the real party plaintiff in this case. If the attorneys representing the Government in this action were representing both agencies of the Government, such confusion and unnecessary conflicts would be eliminated, and all the issues would be before the court at one time. Also, as

the question is jurisdictional, and as we have been unable to find any Supreme Court decision determining the question, we are again questioning the authority of the attorneys for the Price Administrator to institute actions on behalf of the United States independent of the Department of Justice.

The pleadings in this case are not signed by the District Attorney or any member of the Department of Justice (R. 68). Neither do the pleadings allege authorization of the attorneys purporting to represent plaintiff. 28 U. S. C. 485 provides that the District Attorney is to prosecute "all civil actions in which the United States are concerned."

The jurisdiction of the District Court may be invoked by the Government as plaintiff only by those persons and in the manner prescribed by statute. *U. S. v. 1960 acres of land in Riverside County*, 54 F. Supp. 867. The District Court will not recognize any suit prosecuted in the name and for the benefit of the United States unless it is represented by the District Attorney or someone designated by him. *Confiscation Cases*, 74 U. S. 454; *U. S. v. Morris*, 10 Wheaton 246; *U. S. v. Stowel*, 27 Fed. Cases 1350; No. 16409; *U. S. v. McAvoy*, 4 Blatch 418, Fed. Cases No. 15,654; *U. S. v. Doughty*, 7 Blatch. 424, 25 Fed. Cases No. 14,986.

In *U. S. v. Doughty*, 7 Blatch. 424 25 Fed. Cases No. 14,986, a bill in equity was dismissed because it did not state in the body of it that the United States appeared by its District Attorney, the court stating:

"This Court can recognize the United States as a plaintiff on the record only when the record shows that the United States appear as plaintiffs by the District Attorney of this district. * * *"

For a complete and comprehensive discussion of the history of the statutes dealing with powers and duties of the United States Attorney General and the District Attorneys, we refer the Court to *U. S. v. 1960 acres of land*, 54 F. Supp. 867, where a great many authorities are cited and discussed. See also *Cohen v. U. S.*, 38 App. D. C. 123; *U. S. v. Jacinto Tin Company*, 125 U. S. 273; 21 Opinions U. S. Attorney General 195; 32 Opinions U. S. Attorney General 276.

The Circuit Court, in disposing of this question, and holding that the attorneys for the Price Administrator were authorized to institute such action, simply stated:

"In respect of the third contention, it is sufficient to note that Section 201(a) of the Act provides in part that 'the attorneys appointed under this section may appear for and represent the Administrator in any case, in any court.' Consult also 205(a) and (b)."

The quoted portion from Section 201(a) of the Price Control Act is almost identical with Section 3 of the Shipping Act of 1916 (41 Stat. 989), which reads:

"The Board may employ attorneys * * * to appear for or represent the Board in any case in court or other tribunal."

In a lengthy opinion reported in 32 Opinions U. S. Attorney General 276, the Attorney General construed the quoted section and advised that it did not authorize the Shipping Board to conduct or control its own litigation in view of the statutes placing all government litigation under the direction of the Attorney General as the head of the Department of Justice.

In *Sutherland v. International Insurance Co. of New York*, 2 Cir. 1930, 43 F. (2d) 969, it appears from the opin-

ion that the alien property custodian was authorized to "appoint attorneys" and to "file and maintain * * * suits of all kinds, in or before any court." In an opinion by L. Hand, the circuit court dismissed the action for the sole reason that the alien property custodian had commenced the action by his own attorney and not by a district attorney or the attorney general. The court specifically pointed out that the attorney general, by statute, had "control" of all litigation brought by or on behalf of the United States and that "control * * * involves their initiation as well as their subsequent conduct." Therein, the court said:

"The government has provided legal officers, presumably competent, charged with the duty of protecting its rights in its courts. It has specifically authorized these to act, exacting from them compliance with the formalities required of a public officer, even when appointed by the attorney general.

"* * * Congress having so provided for the prosecution of civil suits, *can scarcely be supposed to have contemplated a possible duplication in legal personnel.*" (Italics ours.)

The administrative interpretation placed upon the duties and powers of other departmental government lawyers by the Department of Justice may be found in: "Book of Instructions to United States Attorneys, Marshals, Clerks and Commissioners," issued by the United States Attorney General's office. Therein we find under chapter II, entitled "Legal Matters," with subhead "Duties":

"(1115) Control of causes—The control (extra-judicial) of the conduct and disposition of all litigation, both civil and criminal, *in which the Government of the United States is interested, either directly or indirectly,* is at all times in the Attorney General of the United States. (Italics ours.)

"(1116) Section 771, R. S. (now 485 Title 28 U. S. C., 28 U. S. C. A. § 485), prescribes the general duties of

district attorneys in both civil and criminal matters. They shall conduct and direct all cases except where a special assistant to the Attorney General is specifically appointed for that purpose in specific cases, *although there is no objection to assistance from attorneys connected with other offices of the Government and with the offices of the solicitor of the various departments, in the preparation and trial of cases, as same is often very helpful and desirable. But it must be understood that they assist only, and do not conduct or direct cases in which they may be interested.* (Italics ours.)

It is a matter of history that Congress intended to gather into the Department of Justice, under the supervision and control of the Attorney General and District Attorneys, all the litigation and all the law business in which the United States are interested and which previously had been scattered among different public offices, departments and branches of the government and to break up the practice of frequently employing unofficial attorneys in the public service (5 U. S. C., Sec. 308-312; 28 U. S. C. 485; *Perry v. United States*, 28 Ct. Cl. 485). Congress will not be presumed to have departed from this historical concept without an intention clearly expressed.

The wisdom of the congressional enactments centralizing control of "all litigation" in which the federal government is interested is exemplified by the facts in the instant case. Here we have one agency of the government, the War Production Board, ordering the state to sell a tract of timber because it is essential to the war effort. When the state attempts to comply with the directive, another agency of the government, the Office of Price Administration, seeks to enjoin the very same sale.

It is respectfully submitted that Sec. 201(a) of the Price Control Act does not authorize the institution of

actions independent of the Department of Justice or authorize the conduct of cases without the appearance of the district attorney. The meaning of the section is that in a properly instituted suit, counsel appointed by the Administrator may appear for him.

Repeals by implication are never favored, and the section should be construed to allow the appearance of the Price Administrator's attorneys in a pending action for the purpose of presenting his views and interpretations but not to authorize the institution of actions independent of the Department of Justice. As the matter is jurisdictional, the case should be dismissed.

Point B. The United States Supreme Court Has Exclusive and Original Jurisdiction of This Case

Although this case, when commenced in the District Court, was entitled "Chester Bowles, Administrator, Office of Price Administrator, vs. Jack Taylor, as Commissioner of Public Lands of the State of Washington," the case is in reality an action between the United States of America and the State of Washington, a sovereign state. The complaint alleges that both parties are acting in their official capacities. The Land Commissioner is a constitutional officer of the State of Washington (Art. III, Sec. 1, State Constitution). The act here sought to be restrained is a duty enjoined upon the Land Commissioner by the State Constitution and the statutes of the State of Washington.

It has long been recognized that the omission of the name of the state or the United States, in the title of a case is not the test to determine whether the suit is in fact against the state.

In *Ford Motor Company v. Department of Treasury* (Ind.), 323 U. S. 459, this Court stated that the nature of the suit as one against the state, is to be determined by the essential nature and effect of the proceeding, citing *Ex parte Ayres*; 123 U. S. 443, 490-499; *Ex parte New York*, 256 U. S. 490, 500; *Worcester County Trust Co. v. Riley*, 362 U. S. 292, 296-298.

In the instant case, the injunction, if granted, would operate against the state to the extent of the difference between the price bid and the maximum permitted under the ceiling. It is submitted that this case is clearly an action against the State of Washington. *Great Northern Life Insurance Company v. Read*, 322 U. S. 47; *Ford Motor Company v. Department of Treasury* (Ind.), 323 U. S. 459; *Central Railroad Company of New Jersey v. Martin*, 115 F. (2d) 968, cert. den.; 313 U. S. 569; *Soundview Pulp Company v. Taylor*, 21 Wn. (2d) 261; 150 P. (2d) 839, reprinted in Appendix G to the Petition for Certiorari.

As this is an action against the sovereign State of Washington, jurisdiction of the case is exclusively in the United States Supreme Court. Art. III, Sec. 2, Cl. 2, of the Federal Constitution reads in part as follows:

"In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction."

Sec. 233 of the Judicial Code (36 Stat. 1156, 28 U. S. C. 341) provides:

"*Original jurisdiction.* The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it

shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the laws of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party."

Sec. 233 of the Judicial Code should be read in connection with the quoted constitutional clause and when so read clearly expresses the Congressional intendment that the jurisdiction of the Supreme Court in civil actions to which the State is a party is not only original, but exclusive.

In *United States ex rel. Miller, Alien Property Custodian, v. Clausen*, 291 Fed. 231, appeal transferred by the Circuit Court to the Supreme Court, 293 Fed. 195; error dismissed, 266 U. S. 641, an application was sought for writ of mandate to compel the State Treasurer to pay the alien property custodian the amounts due on certain warrants in his possession. The question was whether the Trading with the Enemy Act had specifically conferred jurisdiction upon the District Court. The act provided:

"The District Courts of the United States are hereby given jurisdiction * * * to enforce the provisions of this act, * * *"

Upon the question of jurisdiction, the court stated, at page 238:

"* * * Under its war powers, Congress undoubtedly could confer upon a District Court authority to coerce a sovereign state and its officers, but that it so intended is not lightly to be concluded in the absence of positive and express congressional enactment, particularly so in view of the provisions of section 233 of the Judicial Code * * *"

"This statute is controlling of this question, despite the fact that the present suit may not be purely a controversy of a civil nature. The dignified treatment and consideration due a sovereign state form no small part of the reason that has actuated the law-making powers in making a state subject alone to the jurisdiction of the Supreme Court. An implied repeal of the law conferring, so far as the courts of the United States are concerned, exclusive jurisdiction on the Supreme Court of suits against a state, is not to be sanctioned, in view of the long-established recognition of this principle in the history of the doctrine of state's rights."

This case is particularly persuasive in that the provisions conferring jurisdiction were equally as broad in the Trading with the Enemy Act there under consideration as they are in the Price Control Act here under consideration.

The Price Administrator relies upon Sec. 205(c) of the Price Control Act to confer jurisdiction upon the District Court. This section would confer jurisdiction only if the state is a person within the meaning of Sec. 205(a) of said act. This is of course the vital question in this case. The Price Administrator argued in both the lower courts that the District Court and the Circuit Court are precluded by the exclusive jurisdictional sections of the Price Control Act (Sec. 204-d) from considering whether a state is within the purview of the Price Control Act because the Administrator has expressly included the states in Maximum Price Regulation 460, and the validity of that regulation has not been challenged in the Emergency Court of Appeals. Although we admit that the Price Administrator's argument is in accordance with the general rule, as laid down in the Price Control Act, and as construed, upon several occasions, by this Court, we do

not admit that the rule has any application to the instant case, because the District Court must, in any action brought before it, first determine its own jurisdiction, and we are not aware of any authority to the effect that the construction of the Price Control Act by the Administrator's regulation is binding upon the District Court for the purpose of determining jurisdiction, even though such determination passes upon the exact question which the Price Administrator passed on in issuing the subject regulation.

The Circuit Court, in rendering its decision in the instant case, relied completely upon *United States v. California*, 297 U. S. 175, which decision reversed the decision of the Circuit Court reported in 75 F. (2d) 41, which held that the District Court was without jurisdiction in an action brought by the United States against the State of California to recover a penalty imposed for violation of the Federal Safety Appliance Act. *United States v. California* is clearly distinguishable upon both the facts and principle. In that case, the Belt Line Railroad, owned by the State of California, paralleled the waterfront of San Francisco Harbor and extended on to some forty-five state-owned wharves. The Railroad served directly about one hundred seventy-five industrial plants and had track connections with one interstate railroad and by wharf connections with freight car ferries and with three other interstate carriers with freight yards in San Francisco. It received and transported from the one to the other by its own engines all freight cars loaded and empty and the freight they contained offered to it by railroad, steamship companies, and industrial plants. The larger part of this traffic had its origin or destination in states

other than California. The Belt Line Railroad was thus a terminal railroad for the industries and carriers with which it connected and it served as a link in the through transportation of interstate freight shipped to or from points in San Francisco over the connecting carriers. Its service was of a public character for hire and did not differ in any salient features from that rendered by the railroads. A most casual reading of these facts makes it entirely clear that the State of California was operating this railroad on a commercial basis, comparable to other railroads, and that such operation was not a mere incident to the discharge of a governmental function, such as the sale of timber by the State of Washington in the administration of its school system. Running a railroad and making an isolated sale of timber differ not only in degree but in principle. To operate a railroad is to invade a field ordinarily reserved to private business, and it is such a business as cannot be said to have any necessary relationship to an essential governmental function, whereas the sale of school grant timber for the purpose of raising revenue to administer the state school system cannot, by any stretch of the imagination, be said to be a private enterprise. Moreover, in deciding the *United States v. California* case, Justice Stone remarked:

"* * * the controversy in a suit authorized by Sec. 6 (of the Safety Appliance Act) is essentially local in character and involves issues for which a jury trial may be appropriate. * * * Their adjudication often requires the presence, as witnesses, of railroad workers, shippers and others of the locality. * * *"

It is clear that the decision is based upon the local nature of the case, and the reasons assigned are not particularly applicable to a suit for injunction under the Price Control

Act. It is also to be noted that the California case was an action to recover a penalty for violation of the Safety Appliance Act. It is highly doubtful if such a suit is an action "of a civil nature" and Sec. 233 of the Judicial Code purports to apply only to suits "of a civil nature." For these reasons, it is respectfully submitted that the doctrine of the California case is not applicable to the case at bar.

In any event, it is respectfully suggested that the principle initiated in *United States v. California* should be re-examined by this Court. The decision of this Court in that case has been criticised in an article appearing in Volume 49, Harvard Law Review, page 1375, from which we quote:

"The Constitution grants original jurisdiction to the Supreme Court in cases 'in which a State shall be Party.' U. S. Const., Art. III, section 2, cl. 2. This has been interpreted to include suits by the United States against a state, although by Article III of the Constitution the judicial power is not expressly extended to such situations. *United States v. Texas*, 143 U. S. 621 (1892); see *United States v. West Virginia*, 295 U. S. 463, 470 (1935). This original jurisdiction was made 'exclusive' by section 13 of the first Judiciary Act. 1 Stat. 40 (1789). And this section later became section 233 of the Judicial Code. 36 Stat. 1156 (1911), 28 U. S. C. section 341 (1935). The Supreme Court is given jurisdiction exclusive of the state courts by section 256 of the Judicial Code. 36 Stat. 1160 (1911), 28 U. S. C. section 371 (1935). Therefore, section 233 seems only to make the Supreme Court's original jurisdiction exclusive of the federal courts. The Supreme Court derives its original jurisdiction from the Constitution and not from Congress. See *United States v. Hudson & Goodwin*, 7 Cranch 32, 33 (U. S. 1812). Since all jurisdiction of the lower federal courts is derived from Congress, the Supreme Court would, therefore, have original jurisdiction exclusive of the lower federal courts un-

less Congress expressly grants concurrent jurisdiction to them. Such jurisdiction may be granted because a state is a party, or under some other branch of the judicial power. U. S. Const. Art. III, section 2, cl. 1. An act granting concurrent jurisdiction under the former branch would completely negative section 233. Hence the only purpose of section 233 seems to be to declare that where a lower federal court is invested with jurisdiction for reasons other than that a state is a party, such jurisdiction shall not be exercised in cases where a state is a party. This is precisely the situation in the present case, and for this reason it seems that section 233 should have applied. Although the reasoning of the Court seems open to criticism, its reliance upon the local nature of the controversy suggests that the holding may be limited to the narrow class of cases in which a state may operate a railroad."

It is submitted that section 233 of the Judicial Code defeats the jurisdiction of the District Court to issue the injunction sought.

Point C. If the District Court Does Have Jurisdiction It May Be Exercised Only by a Three-Judge Court

Section 266, as amended, of the Judicial Code, reads in part as follows:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, * * * shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, * * * (43 Stat. 938; 28 U. S. C. A. 380.)

The requirement of a three-judge court is not a mere privilege or right which the parties may waive, but is a jurisdictional requirement. *Riss and Company v. Hoch* (1938), 99 F. (2d) 553.

In *Michigan Central Railroad Company v. Michigan Public Utility Commission*, 271 Fed. 319, the court held (quoting syllabus):

"A suit to enjoin enforcement of a state statute, on the ground that it is in conflict with a valid federal statute, is based on its unconstitutionality, within the meaning of Judicial Code, section 266 (Comt. St. section 1243), requiring an application for preliminary injunction in such cases to be heard by three judges."

On page 321, the court stated:

"* * * This injunction is not sought upon the ground of the unconstitutionality of such statute, in the more common sense in which we speak of unconstitutionality. That there is a conflict between state and federal law does not always bring to mind the issue of the unconstitutionality of the former; yet it is prescribed by the federal Constitution that it and the laws and the treaties made in pursuance thereof shall be the supreme law of the land, and it seems to follow that a state statute which is in conflict with a federal statute, when the latter is pursuant to and within the power given by the federal Constitution, is, in a very fair sense, unconstitutional. We think the present situation is fully within the spirit and fairly within the letter of section 266, and that the court, as now constituted, has power to hear and determine the application. * * *

In *Connecting Gas Company v. Inies*, 11 F. (2d) 191, at page 195, the court said:

"The mischief at which section 266 is directed was well understood at the time of its passage. It was the tying up of the operation of an act of a state Legislature, or of an order of the state commission, in

either case affecting the state at large, or the operations of a state commission, board, or officials. It was thought unseemly that one District Judge should be permitted to set aside the deliberate acts of a Legislature, or of a commission or board of that nature, acting for or in the name of a sovereign state.

* * *

In *Cumberland Tel. and Tel. Co. v. Louisiana Public Service Commission*, 260 U. S. 212, the court states that the purpose of the act is to prevent inordinate federal interference with statutes and constitutions of the states of the Union. In *Philips v. U. S.*, 312 U. S. 246, Justice Frankfurter states:

"To bring this procedural device in to play * * * requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute * * *"

In *Query v. U. S.*, 316 U. S. 486, it was held that an action by the United States to restrain compliance with the terms of a state statute by state officers on the ground that the state statute was in conflict with a federal act was a proper case for convening a three-judge court. See also *Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310.

In the instant case, the War Production Board has ordered the Land Commissioner to sell the timber (R. 21). Article XVI, Sec. 2, of the Washington State Constitution, provides:

"None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder. * * *"

The constitutional provision is applicable to the instant sale, (R. 21; *Soundview Pulp Co. v. Taylor*, 21 Wn. (2d)

261; 150 P. (2d) 839). Appellant is seeking to enjoin the sale in the manner directed by the State Constitution. It is respectfully submitted, the case is a proper one for the convening of a three-judge court, and in the absence of a court so constituted, the District Court is without jurisdiction to grant the injunction.

The opinion of the Circuit Court in disposing of this question cites for its authority only the case of *Farmers Gin Co. v. Hayes*, 54 F. Supp. 43. In that case, an action was brought by a private corporation to enjoin the Oklahoma Director of the Price Administrator from enforcing a maximum price regulation fixing the ceiling prices on the ginning of cotton. The Price Administrator intervened, seeking to enjoin the Corporation Commission of Oklahoma from enforcing its Commission order, which fixed a higher price for the ginning of cotton. The Price Administrator filed a motion to convene a three-judge court, which motion was granted and in due course the District Court so constituted wrote the decision upon which the Ninth Circuit relies for authority. The *Farmers' Gin Co.* decision seems to recognize that if the asserted immunity to application of the maximum price regulation was placed on constitutional grounds, the three-judge court would have been necessary. This is precisely the question in the instant case. One of the grounds herein being relied upon by the Commissioner of Public Lands is that Maximum Price Regulation 460, when applied to the state, and the Emergency Price Control Act, when construed to authorize the issuance of M. P. R. 460, is unconstitutional. We therefore believe that this case is governed by the doctrine of *Query v. U. S.*, 316 U. S. 486.

Point D. This Court May Determine Whether the Price Control Act Is Applicable to States Even Though the Subject Regulation Has Never Been Challenged in the Emergency Court of Appeals

In the Circuit Court the Administrator argued that the District Court, in denying the injunction, passed upon the validity of the regulation, and in so doing violated the exclusive jurisdiction features of Section 204(d) of the Act as interpreted in *Yakus v. U. S.*, 321 U. S. 414, and *Bowles v. Willingham*, 321 U. S. 503, and other cases following those decisions. We anticipate that the Price Administrator will make the same argument in this Court, and therefore will here set forth our answer to that contention. We do not dispute the Price Administrator's argument that under the authority of those decisions the District Court is prohibited from passing upon the validity of the regulations, but we do not understand those decisions to prevent a court of equity, when requested to issue an injunction, from interpreting the provisions of the Price Control Act; or that the equity court is compelled to issue an injunction on the face of the regulation alone without any consideration to the terms of the Price Control Act, under which the regulation is supposedly issued. In *Bowles v. Bonnie Bee Shop*, 55 F. Supp. 754, the court stated:

"Quite clearly, if the Administrator should promulgate a regulation beyond the statutory authority, its validity could be contested."

In *Bowles v. Nu Way Laundry Company*, 144 F. Supp. 741, at page 744, the Tenth Circuit Court of Appeals stated:

"It is of course the province and the duty of the court to determine for itself whether the party sought to be enjoined under Section 205(a) is within the

coverage of the Act or regulation, but in the determination of that question it is not competent for the court to consider the fairness or the equity of any regulation or price schedule established thereby."

Likewise, in *Bowles v. Good Luck Glove Company*, 148 F. (2d) 579, the Seventh Circuit Court of Appeals adopted and affirmed the decision of the District Court reported in 52 F. Supp. 942, where the court concluded that the Price Administrator, in issuing a regulation, had misconstrued the provisions of the Emergency Price Control Act.

In the instant case, the District Court was careful not to pass upon the validity of the regulation, as a reference to its oral decision will clearly show (R. 56, 57, 63). It is our contention that neither the *Yakus* case nor the *Willingham* case, when properly construed, requires the District Court to issue an injunction when the court is convinced that the regulation sought to be enforced goes beyond the authority delegated to the Price Administrator in the Act.

On this question one opinion of the Supreme Court of Michigan, in *Speicher v. Sowell*, 309 Mich. 54; 14 N. W. (2d) 651, a 4 to 4 decision, stated:

"It is not to be presumed that Congress intended that each and every official under the guise of the authority of the Office of Price Administration could do as he pleased in the whole field of price fixing and be immune from all accountability save only to one court for the whole United States as a court of review of his actions in the first instance. The very fact that only one court is provided of itself would tend to indicate a contrary intention. The section quoted does not in any explicit terms so provide. A careful review and analysis of § 204(d) shows that only regulations that are issued under

the act are protected against review by any tribunal other than the Emergency Court of Appeals and Federal Supreme Court on appeals from that tribunal. The words 'such regulations' thrice recurring in the section can only refer to the regulations and orders preceding in the same section, and those are under the act. Regulations issued not under the act are not so protected. In other words, an officer or authority who does some act not authorized by the Emergency Price Control Act is not protected therein. He may not do an unauthorized act and receive immunity. Acts *ultra vires* are not placed in the jurisdiction of the Emergency Court of Appeals and it is *ultra vires* for the Office of Price Administration to fix maximum prices at which goods may be sold at judicial sales."

In the *Yakus* and *Rottenburg* cases, the regulations therein being considered fixed ceiling prices on meats and rents. There was not any question but that those regulations were within the scope and provisions of the Price Control Act. If the regulation here in question were within the scope and provisions of the Price Control Act, the District Court would not have concerned itself with an interpretation of the Price Control Act. We do not question that Congress may require and by the Price Control Act has required all courts, other than the Emergency Court of Appeals, to refrain from staying the provisions of both the statutes and the regulations, but in the instant case the State is not attempting to restrain or enjoin the enforcement of either the Act or the regulation. Neither do we question the authority of the District Court to enjoin an attempted violation of the Act or regulation if the regulation is lawfully issued—in other words, issued within the scope and provisions of the authority delegated by Congress. A grant of jurisdiction to issue compliance orders hardly suggests an

absolute duty to do so under any and all circumstances. *Hecht Co. v. Bowles*, 321 U. S. 321. But how is the district court to know if the regulation is within the scope and authority delegated to the Administrator if it may not examine and interpret the provisions of the Act? That there is a clear distinction between the consideration of the regulation as distinguished from a consideration of the Act is pointed out by Justice Stone in *Yakus v. U. S.*, 321 U. S. 414, 430, wherein he observes that the Act as originally introduced in the House had provided that the Emergency Court of Appeals should have exclusive jurisdiction to determine the validity of the Act as well as the validity of regulations, but before enactment by Congress, the Act was changed to its present form.

To make our position more clear we submit an obvious illustration: It is not within the scope and provisions of the Act for the Administrator by regulation to control the selling price of books. Congress by Sec. 302-c determined that as used in the Act:

"The term commodity means commodities, articles, products and materials (except materials furnished for the public by any press association or feature service, books, magazines, motion pictures, periodicals or newspapers other than as waste or scrap)."

If the Administrator, ignoring the limitations of Congress, had issued a maximum price regulation on paper bound novels, and applied to an equity court to enjoin a threatened violation, would the equity court have to grant the injunction because no review had been taken to the Emergency Court of Appeals? Obviously not, for such a regulation would not have been issued under the Act. Such a regulation would be *ultra vires*

and *ultra vires* regulations are not within the exclusive jurisdiction of the Emergency Court of Appeals. The hypothetical case which we have made for illustration is closely analagous to the situation confronting the court in *Farmers' Gin Co. v. Hayes*, 54 F. Supp. 47. In that case, the Price Administrator was attempting to enforce compliance with a maximum price regulation fixing maximum prices for a public utility in Oklahoma. The Price Control Act expressly exempted public utilities from the operation of the Act, and this court had previously, in *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, held that public utilities were excluded from the operation of the Price Control Act. The Price Administrator there contended that the District Court had no alternative but to issue the compliance order which the Price Administrator was seeking because the subject regulation had never been challenged in the Emergency Court of Appeals. On this phase of the question the District Court stated:

"Another question has been raised by the Administrator with reference to the jurisdiction of this court to determine whether or not the regulation is pursuant to, or in conflict with, the Emergency Price Control Act, he insisting that the only court which would have jurisdiction to determine this question is the Emergency Court of Appeals. The Emergency Court of Appeals, however, was created by the Act, and it was presumed to have power to determine the validity of any regulation made by the Administrator pursuant to the authority of the Administrator to make such regulation. But the Act provides that 'nothing in this Act shall be construed to authorize the regulation of * * * rates charged by any common carrier or other public utility.'

"This court certainly has jurisdiction to construe federal statutes and it would be inconsistent and slightly immodest for a court created under an act

to construe the act which gave the court birth, relative to a matter expressly excluded from the act in all particulars.

"It is readily conceded that the Emergency Court of Appeals would have jurisdiction to determine the validity of a regulation by the Administrator, if the authority to make such regulation can be found in the Act. But if the Act expressly excludes the authority of the Administrator to make such regulation, the effect of such regulation would be the same as if made by a stranger and presents an issue within the jurisdiction of this court."

We submit that the only way an equity court can determine whether the regulation is authorized by the Act is to construe the Act itself to see if the particular regulation is authorized by the Act. This is what the District Court did in the instant case. It examined the Price Control Act and determined that no such regulation was authorized by the grant of authority from Congress and hence refused to issue the injunction. This it was authorized to do by the very terms of Sec. 204(d). In *Bowles v. Willingham*, 321 U. S. 503, Justice Rutledge clearly states that an equity court would not have to enjoin violation of a regulation invalid on its face. In *Yakus v. U. S.*, 321 U. S. 414, Justice Stone states it is the concern of the courts "to ascertain whether the will of Congress has been obeyed." In *Hecht Co. v. Bowles*, 321 U. S. 321, Justice Douglas states that the injunctive features in the Price Control Act were inserted with a background of several hundred years of equity practice. Obviously then the equity court from whom the Administrator seeks an injunction, must consider and construe the Price Control Act to see if the subject regulation is within the scope and authority delegated by Congress, and thus subject to review in the exclusive

forum, or whether the regulation is *ultra vires* and hence not placed within the exclusive jurisdiction of the Emergency Court of Appeals.

Point E. Congress Never Intended the Price Control Act to Apply to States

So far as we have been able to find, three state courts of last resort, namely, Washington, Idaho and Michigan, have passed on the question of whether Congress intended to include the states when passing the Price Control Act. These three cases are reported as follows:

Soundview Pulp Company v. Taylor, 21 Wn. (2d) 261; 150 P. (2d) 839;

Twin Falls County v. Hulbert, 156 P. (2d) 319; and *Speicher v. Sowell*, 309 Mich. 54; 14 N. W. (2d) 651.

The Washington court held, in a divided opinion, that the Price Control Act was not applicable to states when the sale was made in the sovereign capacity. The Idaho court took a broader view. It unanimously held that the Price Control Act was not applicable to sales made by a state. The Michigan supreme court, in a four to four decision, affirmed a Michigan circuit court decision, holding that the Price Control Act was not applicable to a liquidation sale in state courts carried on in compliance with state laws.

Three district judges have likewise considered whether the Price Control Act was applicable to states, and all three decisions conclude that Congress never intended to include the states when the sales were made in the exercise of governmental functions. These three District Court decisions are:

The decision of the District Court in the instant case, not reported, but appearing in the record, commencing at

page 56, *Brown v. Texas Liquor Control Board*, 54 F. Supp. 350, and *Bowles v. Texas Liquor Control Board*, 59 F. Supp. 681.

The *Texas Liquor* case in 54 F. Supp. 350, was affirmed by the Fifth Circuit Court of Appeals in 146 F. (2d) 155, which opinion found it not necessary to pass upon the issues here in question, and the *Texas Liquor* case in 59 F. Supp. 681, was reversed by the Fifth Circuit in 148 F. (2d) 265, although it is to be noted that that decision is rested solely on the ground that the court could not consider the question because the validity of the regulation therein challenged had never been before the Emergency Court of Appeals.

The decisions of the three state courts and the three district judges find ample support in the provisions of the Price Control Act when that Act is carefully analyzed.

Nowhere in the Emergency Price Control Act is there any express mention that the Act should apply to a state. Section 1 (c) of the Act contains the applicability clause and reads as follows:

"The provisions of this Act shall be applicable to the United States, its Territories, and possessions, and the District of Columbia."

It seems plain, on the face of this paragraph, that individual state governments as such are not included. The term "United States" refers to the federal government and not to state governments individually or collectively. States do not have "territories and possessions."

The term "United States" has a fixed and definite meaning in the law and refers to the federal government or the "union of separate states under a common constitution." *Texas v. White*, 74 U. S. (7 Wall) 700. The term

"territories and possessions" also has a fixed and definite meaning, as has the expression "District of Columbia," and neither includes a state. *Eidman v. Martinez*, 184 U. S. 578; *People v. Black* (Cal.), 54 Pac. 385. None of the terms used in this section of the act can be construed to include the individual states of the Union, for the word "state" also has a definite, fixed and certain meaning and means one of the forty-eight sovereign political bodies comprising the United States. *Downs v. Bidwell*, 182 U. S. 244; *La. Parte, Virginia*, 100 U. S. 339. When Congress adopted the applicability clause into the Act and omitted the word "state," it seems only reasonable and proper to conclude that the omission was purposeful and with the predetermined intention of excluding the individual state from the operation of the Act.

"The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with special force to statutes by which prerogatives, rights, titles, or interests of the state would be divested or diminished; or liabilities imposed upon it; * * *"

59 C. J. 1103, § 653.

The Circuit Court, in its opinion, concluded that states were included within the purview of the Act by reason of the Act's definition of the word "persons." The definition is found in section 302 of the Act and reads:

"(h) The term 'person' includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or

any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency."

What did Congress intend by using the phrase "any other government?" That is the principal question for determination in this case. The question is clearly answered in *Twin Falls County v. Hulbert*, 156 P. (2d) 319, wherein the Supreme Court of Idaho, in an unanimous opinion, held that the Price Control Act was not applicable to states. On page 327 of that opinion the court stated:

"The portions of official pronouncements of the Office of Price Administration in their publications, cited in the note, comprehensively cover and sufficiently show the official theories and practice as to the statutory coverage of 'governments,' i. e., that 'governments' meant, as the context of the act amply indicates, other national sovereignties comparable with the United States as a nation not subdivisions or agencies thereof.

"The statistical abstract of the United States as promulgated by the Department of Commerce, 1942, together with the report of the United States Department of Commerce on Foreign Commerce and Navigation to the United States for 1941, together with possible later tabulations showing the amount, volume and trend of exports and imports, were, of course, available to Congress and no doubt relied upon by it in determining it was necessary to make the law applicable to governments recognized as such other than the United States.

"The magnitude of these transactions speaks for itself. One instance suffices to illustrate, the 16th report to Congress on land-lease operations for the period ending June 30, 1944, page 58, Table 20, shows total exports alone to have been \$21,535,000,000. United Kingdoms (Great Britain), U. S. S. R. (Russia), Africa, Middle East, Mediterranean Area, China, India, Australia, New Zealand, and other countries being the recipients."

Had Congress intended to include the individual states it certainly would have said so in plain, unequivocal language. The definition of the word "persons" in the Price Control Act is ambiguous at best, and this Court should not by construction imply an intention to include the state when Congress has not expressly done so.

In *Penn Dairies v. Milk Control Commission*, 318 U. S. 261, this Court stated:

"An unexpressed purpose of Congress to set aside statutes of the States regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication (citing cases), should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation."

Not only has Congress failed to expressly say that the Price Control Act shall be applicable to the states, but the entire tenor of the Act militates against this conclusion.

In section 2 (e) of the Act, the Price Administrator is authorized to buy and sell at public or private sale without regard to the provisions of law requiring competitive bidding. This is the only place in the Act where competitive bidding is mentioned, or where public sale is mentioned. Such reference, with an entire omission of state held public sales, evinces, in a degree, an intention of Congress not to deal with public official sales.

Further support for this view is found in the statutory definition of the word "commodity," which contains the following exception:

"* * * nothing in this Act shall be construed to authorize the regulation of * * * (2) rates

charged by any common carrier or other public utility, * * *

The reason for this exception is that Congress did not feel it necessary to regulate a type of business whose charges were already regulated by the individual sovereign states. *Davies Warehouse Co. v. Bowles*, 321 U. S. 144. In that case, the Supreme Court of the United States, in holding that an O. P. A. maximum price regulation purporting to place a ceiling on warehouse rates was invalid as applied to a California warehouse that was subject to state regulation, said:

* * * But as matter of policy Congress may well have desired to avoid conflict or occasions for conflict between federal agencies and state authority which are detrimental to good administration and to public acceptance of an emergency system of price control that might founder if friction with public authorities be added to the difficulties of bringing *private self-interest* under control. Where Congress has not clearly indicated a purpose to precipitate conflict, we should be reluctant to do so by decision. * * * Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the court that 'the extension of federal control into these traditional local domains is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions."' * * *

If Congress felt that it was not necessary to regulate public utilities because their charges are regulated by the individual states, for even greater reason, Congress could have had no intention to regulate the internal business of the sovereign state itself.

Other sections of the Act indicate that the Price Control Act is not applicable to states. In section 2 of the Act appear the following quotations:

"(a) * * * Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, * * * advise and consult with representative members of the *industry* which will be affected * * *. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the *industry* subject to such maximum price, regulation, or order of the Administrator, appoint an *industry* advisory committee, * * * consisting of such * * * *representatives of the industry* * * *." (Italics supplied.)

(d) of said section reads:

"Whenever in the judgment of the Administrator such action is necessary * * * he may, * * * regulate or prohibit *speculative or manipulative practices* * * * or hoarding * * * which * * * are likely to result in price * * * increases, * * *." (Italics supplied.)

(e) of said section reads:

"Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained * * * he may * * * buy or sell * * * store or use, such commodity * * * as he determines to be necessary to obtain the maximum necessary production thereof * * *."

(h) of said section reads:

"The powers granted in this section shall not be used * * * to compel changes in the *business practices*, * * * established in any *industry* * * *." (Italics supplied.)

All of the above quotes lead to the conclusion that the act is intended to apply to industries and to private sales

made in the regular course of business and not to a public sale made by the state (which is certainly not an industry) for the purpose of securing revenues for its school funds. Although it might be argued that sales of state timber *affect industry* and are of sufficient frequency to be considered as regular business sales, the same is true of agricultural products and other commodities which are expressly exempted from the Act, and had it been the congressional intention to include state sales within the Act, Congress would certainly have so stated.

Attention is called to section 205 (f), which provides that whenever in the judgment of the administrator such action is necessary, he may by regulation or order require any person subject to any regulation or order issued under section 2 to procure a license as a condition of selling any commodity covered by such order. The section makes certain exceptions which are not pertinent here. It does not in terms except sales by states or officers of states. If the Price Control Act is applicable to states, it is within the literal wording of the Act for the Price Administrator to require the states to obtain a license before making a sale. It seems inconceivable that Congress intended such a wholesale invasion and regulation of the states' internal functions. It seems more reasonable to conclude that it was the intention of Congress that the Price Control Act should not be applicable to states.

In *Speicher v. Sowell* (C. C. H. War Law Service, Price 4, 1 Price Control Cases 51,000, affirmed by a divided court, 309 Mich. 54; 14 N. W. (2d) 651), a Michigan circuit court case, the court was called upon to determine whether a maximum price regulation of the O. P. A. should, by construction, be held to be applicable to an

execution sale, and the court, in holding that the Price Control Act was not applicable to execution sales, made this statement:

" * * * But to attribute to Congress the intention of doing what the Office of Price Administration claims this act has done would be to impute to that august body a most amazing lack of consideration for states rights and most amazing ignorance of what is necessary in the orderly conduct of judicial proceeding. If the act means what it is claimed to mean, then, in so far as it authorizes such interference with state judicial proceedings, it is invalid. However, it would be an act of gross disrespect to accuse the Congress of the United States of entertaining any such intention. If it had entertained that intent it would surely, out of decent respect for the dignity and integrity of the several states of the Union, have expressed it in unmistakable language. The intent cannot be read into the Act by any implication."

The Ninth Circuit Court in resting its inclusion of the states upon the statutory definition of the word "persons," states:

"So comprehensive is the definition that nothing short of an express exclusion of the states and their political subdivisions would serve to exempt sales made by them from the sweep of the statute."

This statement is of course absolutely contra to every accepted rule of statutory construction, and is directly opposed to the reasoning of the District Court, decided by the Honorable Chas. H. Leavy, who was a member of the Congress which passed the Price Control Act. In his decision he stated (R. 58):

"The Emergency War Act was passed by the Congress, as the debates indicate and as the Committee Reports likewise establish, with considerable concern as to how far-reaching it might be, and safeguards were sought to be written into it. It is an Act that is shot through with exceptions, and then a definite date

set upon which it should come to an end unless extended by Act of Congress, which has since been done, all of which evidences to this Court the fact that it was an absolutely essential Act in a period of crises but one that was not to be construed beyond the need that brought it into being."

The Circuit Court, in its decision, then goes on to justify its holding by pointing out that the western states are the largest owners of standing timber, and states:

"If they were left exempt, their sales at unrestricted competitive bidding would disrupt attempts looking toward the control of the price of this scarce and essential commodity, as well as the price of the processed product. Nor would the evil necessarily stop there. It is a commonplace that inflation at one point tends to beget inflationary consequences at others."

Authority for this statement is cited as the Statement of Considerations for Regulation No. 460, filed by the Administrator with the Division of the Federal Register, 7 F. R. 7871; 8 F. R. 4681, and the opinion then concludes that common schools are notoriously the most grievous sufferers from wartime inflation.

This entire argument is of course an economic argument and not a legal argument at all. Supposed economic necessity is always advanced to justify the usurpation of powers not granted by Congress, but even as an economic argument it is entirely fallacious. Everyone who has any familiarity whatever with the lumber industry knows that the price of logs and the price of manufactured lumber is not fixed and controlled by the sale price of isolated tracts of timber. Just the reverse is true. The market value of timber lands is fixed by the demand for logs and the consequent market value of logs in salt water. The Price Administrator's State-

ment of Considerations is of course nothing more than a self-serving declaration wherein no opportunity has been afforded for cross-examination, nor has any opportunity been afforded to refute the statement with evidence. The Statement is absolutely worthless so far as having any evidentiary value and should not be given any consideration in the determination of this case.

As long as the Circuit Court of Appeals has seen fit to rest its decision upon an economic argument, it may not be amiss to point out the fallacy of its assumptions a bit further. The Supreme Court of Washington has held that under the State Constitution the Land Commissioner cannot sell except to the highest bidder, and if a bid exceeds the ceiling price, there can be no sale. Consequently, the effect of a Circuit Court's decision is to prevent sales in excess of the ceiling which, coupled with the Supreme Court's decision that there can be no sale at the ceiling, in effect prohibits sales of state-owned timber and removes that timber from the market. Consequently, the timber buyers have only the private market to look to, which means that the commercial market has so much less timber available, but an equal amount of money available for the purchase of timber. Therefore, the Price Administrator's action and the Circuit Court's decision aggravate the shortage of timber and increase the pressure on the Administrator's timber ceiling prices. The result is that production is stifled and less timber flows into the commercial lumber market, but the same amount of money remains in circulation, so that more inflation results. On the other hand, were the State timber allowed to go into the commercial market, the money, which is paid for the timber, is frozen by the terms of the Enabling Act and the State Constitution into a perma-

ment school fund, which cannot be spent except for the interest it earns, so that an additional amount of timber products is produced, less money is in circulation, and the deflationary trend is obtained. One of the purposes of Congress in passing the Price Control Act was to prevent inflation. The Circuit Court's decision here produces the antithesis of that purpose. It is not unreasonable to presume that Congress was aware of these economic laws when it failed to expressly include the states in the Price Control Act. The economic argument could be drawn out indefinitely. However, as we pointed out in the beginning, we believe that the problem here before the Court is a legal one and should be approached from a legal point of view—not an economic one.

We submit that Congress never intended the Price Control Act to be applicable to states.

Point F. If the Price Control Act Includes the States It Does Not Apply to A Sale of Timber from Its School Sections

The instant sale involves the timber on section 36, township 36 North, Range 5 East W, M. This section is part of the lands granted to the State of Washington by the United States for educational purposes.

By the Organic Act, (Act of Congress, dated March 2, 1853, entitled "An Act to Establish the Territorial Government of Washington") that portion of the Oregon territory north of the Columbia River was established as the Territory of Washington. After defining the boundaries of the new territory and establishing a territorial government, section 20 of that act provides:

" * * * That when the lands in said Territory shall be surveyed under the direction of the Government of the United States preparatory to bringing the same into market or otherwise disposing

thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory.
* * *

An Act of Congress, dated February 22, 1889, provided for the admission of North Dakota, South Dakota, Montana and Washington into the Union as new states. Section 10 of that act (hereinafter referred to as the Enabling Act) provides:

"That upon the admission of each of said states into the Union, sections numbered sixteen and thirty-six in every township of said proposed states * * * are hereby granted to said states for the support of common schools, * * *"

Section 11 of the Enabling Act reads:

"That all lands herein granted for educational purposes shall be disposed of only at *public sale*, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. * * *" (*Italics supplied.*)

Section 13 of the Enabling Act provides that five per cent (5%) of the proceeds of the sales of public lands lying within the new states which shall be sold by the United States shall be paid to said states for the support of the common schools.

Section 14 of the Enabling Act provides that certain grants previously made to the territories of Dakota, Montana and Washington shall be confirmed in the new states and then that section provides:

"* * * The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said states respectively, * * *"

The Constitution of the State of Washington was adopted as provided in the Enabling Act, and the following constitutional provisions deal with school and granted lands. Section 1, Article IX, provides:

"It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."

Section 3 of Article IX provides:

"The principal of the common school fund shall remain permanent and irreducible. * * *"

Section 1 of Article XVI provides:

"All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interests disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; * * *"

Section 2 of Article XVI provides:

"None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder; and the value thereof, less the improvements, shall, before any sale, be appraised by a board of appraisers, to be provided by law, the terms of payment also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land. * * *"

Section 3 of Article XVI prescribes certain limitations on sales and among other things also provides:

"* * * that no sale of timber lands shall be valid unless the full value of such lands is paid or secured to the state."

On November 11, 1889, the offer of the United States as set forth in its Enabling Act, and the acceptance of

that offer by the people of the Northwest Territory as contained in the Washington Constitution, was recognized as complete when the President of the United States proclaimed the admission of the State of Washington into the Union "on an equal footing with the original states."

The grant of these lands by the United States and their acceptance by the State of Washington, as illustrated in the above set out quotations from the Enabling Act and the State Constitution and recognized by the Presidential proclamation, constitutes a compact between the State of Washington and the United States which cannot be violated by either party without consent of the other. The rule is stated in 50 C. J. 963, sect. 162, as follows:

" * * * The grant and its acceptance by the state constitute a solemn compact between the state and the United States whereby the state becomes the purchaser of the school sections for a valuable consideration with full power to sell or lease the same for the use of schools as the state may deem most beneficial to the inhabitants of the respective townships, and the grant cannot be withdrawn after its acceptance by the state, *nor can the terms of the grant be changed* except with the consent of the state. * * * " (Italics supplied.)

The sacred nature of this compact is stated in *Cooper v. Roberts*, 59 U. S. 173, decided by the Supreme Court of the United States in 1855, relating to the school grant to Michigan, and in *Beecher v. Wetherby*, 95 U. S. 517, decided by the Supreme Court of the United States in 1877, involving the school grant to the State of Wisconsin. In *Cooper v. Roberts*, 59 U. S. 173, after discussing at length the purposes and nature of the school grants, the court said:

"The trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the state is plenary and exclusive. In the present instance, the grant is to the state directly, without limitation of its power, though there is a sacred obligation imposed on its public faith. * * *"

In *State v. Whitney*, 66 Wash. 473, 120 Pac. 116, the court held that the grant to the State of Washington of school sections sixteen and thirty-six was a compact with this state that could not be affected by a subsequent act of Congress amending the general law applicable to such grants in other states.

In *Slodn v. Blythville Special School District No. 5*, 169 Ark. 177, 273 S.W. 397, it was held that the grant by Congress to the state of lands for educational purposes and its acceptance by the state created a compact between the parties which could not be abrogated by an act of the legislature or by an act of Congress.

In *City of Trent v. Robertson*, 125 Miss. 31, 87 So. 464, the court stated:

"* * * when the act (land grant) was passed the state's title to the land had fully vested so that it was then beyond the power of Congress to change the terms of the grant. * * *"

In *Newton v. State Board of Land Commissioners*, 37 Ida. 38, 219 Pac. 1053, the court made this statement:

"The Idaho Admission Bill, containing the land grants by the Government to the state * * * together with the acceptance by the Congress of the provisions of the Constitution, regulating the manner of locating such lands and the disposition thereof, constitute a compact between the Government and the state, which neither may abrogate or modify without the consent of the other party * * *"

Other cases holding that the grant of school lands and its acceptance by the state constitute an inviolable compact include *Board of Trustees v. State of Indiana*, 55 U. S. 268, and *McGee v. Mathis*, 71 U. S. 143.

The Enabling Act states that the land cannot be disposed of except at "public sale." The Constitution states that the land cannot be disposed of except "at public auction to the highest bidder." It is too clear to permit a doubt that the "public sale" required by section 11 of the Enabling Act and the "public auction to the highest bidder" required by section 2, Article XVI, of the State Constitution, mean one and the same thing and are synonymous in the law.

In *Mechem on Sales*, Volume 1, sect. 10, the term "public sale" is defined to mean:

"A public sale is one made at auction to the highest bidder. * * *"

In *Ex parte Keller*, 185 S. C. 283, 194 S. E. 15, the court said:

"A 'public sale' is one made at auction to the highest bidder; a sale where all persons have the right to come in and bid. * * *"

In *Union and Mercantile Trust Co. v. Harnwell*, 158 Ark. 295, 250 S. W. 321, the court said:

"A public sale is one made at auction to the highest bidder. * * *"

To apply the ceiling promulgated pursuant to the provisions of the Price Control Act to the sale of state owned timber from a school section is utterly antagonistic to the provisions set up in the compact which has for its purpose a guarantee that the state will realize full value for the sale of its timber in a free and open market.

The grant of lands by the Federal government to a new state for the perpetual support of educational institutions is in no sense a mere gratuity. The same individuals are citizens of the state and citizens of the United States. Both sovereignties have an equal interest in providing for the education of their common citizens. The United States makes its contribution to that common end by granting aid in the form of land grants; the balance of the burden must be borne by the state. While both governments make their contribution, the plan contemplates that the educational institutions and the funds derived in support thereof shall forever remain under the exclusive control of the states.

The Court will, of course, have in mind that the grant of lands to the State of Washington for educational purposes was not an isolated transaction. Grants have been made to the states of Ohio, Louisiana, Indiana, Mississippi, Illinois, Alabama, Missouri, Arkansas, Michigan, Florida, Iowa, Wisconsin, California, Minnesota, Oregon, Kansas, Nevada, Nebraska, Colorado, North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, New Mexico, and Arizona, twenty-nine states in all. (See footnote 240 U. S. 198.)

The trust created by the compact between the Federal government and the state government partakes somewhat of the nature of a treaty between the Federal government and a foreign government. While it may be admitted that Congress has the power to repeal a prior treaty by subsequent statute, every presumption is against such a construction of the latter statute. The *Cherokee Tobacco*, 78 U. S. 616; *Head Money Cases*, 112 U. S. 580; *The Chinese Exclusion Cases*, 112 U. S. 536,

130 U. S. 581. Even stronger reason exists for such presumption when the problem under consideration is a solemn compact between the Federal government and one of the sovereign states of the Union.

The Price Control Act was passed as an exercise of the war powers of Congress, and even admitting for the sake of argument that under its war powers Congress has power to abrogate treaties, violate contractual rights, and abrogate the compact here under discussion, still the fact remains that *there is nothing in the Price Control Act of 1942 which indicates that it was the congressional intent to supersede and abrogate this compact.* It is hard to believe that Congress intended standing timber held in trust by a state for the support of its common schools to be subject to the provisions of the Act, and in view of the firmly established and long settled policy of the United States to grant the school sections in aid of the incipient states to become sovereign communities, the constancy with which the United States has adhered to the policy in the various compacts with the people, the care with which Congress has manifested an intention to prevent a dissipation of the trust, and the sacred nature with which the courts have viewed these compacts, it is respectfully submitted that the terms of the compact should not be wholly nullified by such loose, ambiguous and equivocal language as is contained in the Price Control Act.

In *Bowles v. Inland Empire Dairy Assn.*, 53 F. Supp. 210, Judge Schwellenbach, in holding that the O. P. A. was without authority to fix maximum prices for payment of patronage dividends by a farmer cooperative, made this statement:

" * * * Remembering the widespread use of farmer cooperatives and the well-established legislative and administrative policy of our Government in fostering them, I cannot believe the Congress intended thus to strike them down. In the light of this background, the Court would not be justified in so concluding without a more clearly expressed indication of Congressional intent. * * *

Although the case is decided on other grounds, we believe the quotation could aptly be paraphrased to apply to sales of state owned timber acquired by the compact.

In the absence of far clearer language compelling that result, it cannot be supposed that Congress, in passing the Price Control Act, intended to abrogate or suspend the terms of its prior legislation, the Enabling Act. Still less can it be assumed that Congress intended to delegate that power to an administrative agency. If that was the intention of Congress, it is natural to expect that something more than a vague implication would be inserted to produce that result. Full effect may be given to both acts by concluding that the Price Control Act has no application to sales of timber acquired under the terms of the Enabling Act.

Point G. If the Act Intended to Include the Instant Sale It is Unconstitutional in Its Operational Effect

The Circuit Court disposes of the constitutional question with only a single sentence, as follows:

"The constitutionality of the Emergency Price Control legislation has been set at rest in *Yakus v. U. S.*, 321 U. S. 414, and *Bowles v. Willingham*, 321 U. S. 503."

The *Yakus* and the *Willingham* cases do uphold the constitutionality of the Price Control Act so far as the constitutional questions there raised are concerned, which

included the constitutional questions of procedural due process and whether the Act contains sufficient standards for the delegation of legislative power, but the *Yakus* and *Willingham* cases do not purport to pass upon nor do they have anything to do with the constitutional issue here raised. In the instant case, we have no quarrel with the Price Control Act as written by Congress, but when that Act is given the interpretation placed upon it by the Administrator in Maximum Price Regulation 460, we seriously question its constitutionality.

In selling the state school sections, the state is engaged in a governmental function. *Burnett v. Coronado Oil & Gas Co.*, 285 U. S. 393; *Helvering v. Producers Corp.*, 303 U. S. 376, overruling *Burnett v. Coronado Oil & Gas Co.*, 285 U. S. 393; *Allen v. Regents*, 304 U. S. 439; *Soundview Pulp Co. v. Taylor*, 21 Wn. (2d) 261, 150 P. (2d) 839. It has long been a recognized principle of our jurisprudence that the Federal Constitution impliedly prohibits the Federal Government from passing any laws which obstruct or unreasonably threaten to obstruct any function essential to the continued existence of state government. *Helvering v. Gerhardt*, 304 U. S. 405; *Collector v. Day*, 11 Wall. 113; *Metcalf v. Eddy*, 269 U. S. 514; *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429. A clear and concise statement of the rule appears in 11 Am. Jur. p. 870, § 174:

"Among the matters which are implied in the Federal Constitution, although not expressed therein, is that the National Government may not, in the exercise of its powers, prevent a state from discharging its ordinary functions of government. This corresponds to the prohibition that no state can interfere with the free and unembarrassed exercise by the Federal Government of all powers conferred upon it.

In other words, the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other. * * *

Where the court has upheld the power of Congress to impose burdens on the activities of the states, it has been in that field where the function involved was not essential to the maintenance of the state government. *South Carolina v. United States*, 199 U. S. 437; *Metcalf v. Eddy*, 269 U. S. 514; *Florida v. United States*, 282 U. S. 194; *Helvering v. Gerhardt*, 304 U. S. 405; *California v. United States*, 320 U. S. 577; or where the state has chosen to provide funds for a governmental purpose by conducting a business "having the incidents of similar enterprise usually prosecuted for private gain." *Allen v. Regents of University System*, 304 U. S. 439. In the instant case, the state has not sought to compete in a field usually reserved for private business. The instant sale is for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens. If the powers delegated to the Administrator in the Price Control Act are to be construed to authorize his interference in the discharge of functions essential to the continued existence of state government, then it is submitted that that Act, so far as the instant regulation is concerned, has become unconstitutional in its operational effect.

While we recognize the tremendous breadth of the power to wage war delegated by the states to the federal government under the Federal Constitution, even that power must be exercised "subject to applicable constitutional limitations." *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156, and even the war power "does not remove constitutional limitations safeguarding essential

liberties." *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 426.

In *Carter v. Carter Coal Co.*, 298 U. S. 238, Justice Sutherland quotes with approval from *Texas v. White*, 7 Wall. 700:

"* * * the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

Commenting upon the quotation, he there states at p. 295:

"Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to a little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified."

In his dissent to the majority decision in *Bowles v. Willingham*, Justice Roberts states:

"No truer word was ever said than this court's statement in the *Minnesota Mortgage Moratorium* case that emergency does not create power but may furnish the occasion for its exercise: The Constitution no more contemplates the elimination of the coordinate branches of Government during war than in peace * * *"

Neither does the Constitution contemplate the elimination of the essential functions of state government dur-

ing a period of war. In *Lane County v. Oregon*, 7 Wall. 71, the court observed:

" * * * The states disunited might continue to exist. Without the states in union, there could be no such political body as the United States."

The war emergency gives the Federal government no powers that it does not enjoy in peace time. Should Congress in peace time attempt to interfere with the state governments in the exercise of purely governmental functions, the courts would not hesitate to declare the invasion unconstitutional.

It is respectfully submitted that Maximum Price Regulation 460 and the Emergency Price Control Act, if that Act authorizes the issuance of Maximum Price Regulation 460, are unconstitutional so far as they apply to the sale in issue.

VIII.

CONCLUSION

The decision of the Circuit Court should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

SMITH TROY,

Attorney General of the State of Washington.

R. A. MOEN;

Assistant Attorney General of the State of Washington.

EDWIN C. EWING,

Assistant Attorney General of the State of Washington.

Attorneys for Petitioner.

Appendix A

EXPLANATORY NOTE

Throughout this collation roman type is used to indicate text which has not been changed since original enactment, and italics are used to indicate amendments.

[EMERGENCY PRICE CONTROL ACT OF 1942,^① AS AMENDED, JUNE 30, 1944]

TITLE I—GENERAL PROVISIONS AND AUTHORITY

PURPOSES; TIME LIMIT; APPLICABILITY

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in se-

^①56 Stat. 23; 50 U. S. C. App. secs. 901-946.

curing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on *June 30, 1945*,[©] or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of the Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sus-

[©]Originally "June 30, 1943." On October 2, 1942, amended to read "June 30, 1944" (sec. 7 (a) of Stabilization Act of 1942, 56 Stat. 767). On June 30, 1944, amended to read "June 30, 1945" (sec. 101 of Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess.).

taining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

(c) The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia.

PRICES, RENTS, AND MARKET AND RENTING PRACTICES

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threatened to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the

commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods.*^② Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations.^③ In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry; or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee

^②Added by sec. 102 of Stabilization Extension Act of 1944.

with respect to the regulation or order, and with respect to the form thereof, and classifications, deferentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, and *such recommendations shall be considered by the Administrator.*^③ Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

SEC. 2. (c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. *Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevail-*

^③Added by sec. 102 of Stabilization Extension Act of 1944.

ing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs.⁶ Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

* * * * *

SEC. 2. (g) Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

* * * * *

⁶Added by sec. 102 of Stabilization Extension Act of 1944.

SEC. 201. (d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

SEC. 203. (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,*⁵ any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provisions and affidavits or other written evidence in support of such objections.⁶ Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,⁷ the Administrator shall either

⁵ As amended by sec. 106 of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

⁶ As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

⁷ As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs: *Provided, however, That, upon the request of the protestant, any protest filed in accordance with subsection (a) of this section after September 1, 1944, shall before denial in whole or in part, be considered by a board of review consisting of one or more officers or employees of the Office of Price Administration designated by the Administrator in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees thereof, and shall provide that, upon the request of the protestants and upon a showing that material facts would be adduced thereby, subpoenas shall issue to procure the evidence of persons, or the production of documents, or both. The Administrator shall cause to be presented to the board such evidence, including economic*

data, in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board and the board shall make written recommendations to the Price Administrator. The protestant shall be informed of the recommendations of the board and, in the event that the Administrator rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection.*

(d) Any protest filed under this section shall be granted or denied by the Administrator, or granted in part and the remainder of it denied, within a reasonable time after it is filed. Any protestant who is aggrieved by undue delay on the part of the Administrator in disposing of his protest may petition the Emergency Court of Appeals, created pursuant to section 204, for relief; and such court shall have jurisdiction by appropriate order to require the Administrator to dispose of such protest within such time as may be fixed by the court. If the Administrator does not act finally within the time fixed by the court, the protest shall be deemed to be denied at the expiration of that period.*

REVIEW

Sec. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint, with the Emergency Court of Appeals, created pursuant to subsection

*Added by sec. 106 of Stabilization Extension Act of 1944.

*Added by sec. 106 of Stabilization Extension Act of 1944.

(c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceeding in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and

any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as

the judgment of the court. *Two judges shall constitute a quorum of the court and of each division thereof.*⁶ The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein

⁶Added by sec. 107 (a) of Stabilization Extension Act of 1944.

pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any

objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expira-

tion of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.[®]

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage

[®]Entire subsec. (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

* * * * *

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205

(f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found: *Provided, however, That all suits under subsection (e) of this section shall be brought in the district or county in which the defendant resides or has a place of business, an office, or an agent.*⁹ Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs

⁹Added by sec. 108 (a) of Stabilization Extension Act of 1944.

shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

SEC. 302: As used in this Act—

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

(h) The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or

any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency.

Appendix B

MAXIMUM PRICE REGULATION NO. 460

[MPR 460]

WESTERN TIMBER

A statement of the considerations involved in the issuance of this regulation, issued simultaneously herewith, has been filed with the Division of the Federal Register.

§ 1426.251. *Maximum prices for western timber.* Under the authority vested in the Price Administration by the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250, Maximum Price Regulation No. 460 (Western Timber) which is annexed hereto and made a part hereof is hereby issued:

AUTHORITY: § 1426.251 issued under Pub. Laws 421 and 729, 77th Cong.; E. O. 9250, 7 F. R. 7871.

MPR—WESTERN TIMBER

CONTENTS

Sec.

1. Sales of Western timber at higher than maximum prices prohibited.
2. What products are covered.
3. What transactions are covered.
4. What persons are covered.
5. Maximum prices for publicly-owned western timber.
6. Maximum prices for privately-owned western timber.
7. Maximum prices for privately-owned western timber where section 6 cannot be applied.
8. Separate computation of non-timber values where land is sold with timber.

9. Records and reports.
10. Petitions for amendment.
11. Enforcement.

SECTION 1. *Sales of western timber at higher than maximum prices prohibited*—(a) *General*. On and after August 31, 1943, no person shall sell, buy, or reappraise (or agree or attempt to sell or buy) western timber at higher than the maximum prices established in this regulation. Written firm contracts made before August 31, 1943 may be completed at the contract price (but where the contracts are reappraised or renegotiated, all the provisions of this regulation shall apply to the reappraisal or renegotiation).

SEC. 2. *What products are covered*. This regulation covers, under the name "Western timber", all timber (whether green or dead, standing or down, of all species, classes and sizes, where the timber has not been severed from the stump), west of the 100th meridian of longitude.

SEC. 3. *What transactions are covered*. (a) This regulation covers all sales of western timber if the primary purpose of the purchase is the acquisition of timber for commercial conversion into timber products. If the value of the timber constitutes 60 per cent or more of the total consideration, it shall be conclusively presumed that the primary purpose of the purchase was the acquisition of timber for commercial conversion.

(b) This regulation does not cover transactions involving a timber value less than \$1,000.

(c) This regulation does not cover or affect transactions where the purchaser does not have the right to cut any timber for a period of 10 years or more from the date of the contract.

SEC. 4. *What persons are covered.* Any person who makes the kind of sale or purchase covered by this regulation is subject to it. The term "person" includes: an individual, corporation, partnership, association, or any other organized group of persons, or their legal successors, or representatives; the United States, any State or any government, or any of its political subdivisions; or any agency of the foregoing.

SEC. 5. *Maximum prices for publicly-owned western timber.* The maximum prices for publicly-owned timber shall be the total of the appraised valuation for each species (or species price group) offered for sale, plus the additions set forth below. "Appraised value" for the purpose of this regulation shall be based on the appraisal principles used by the public agency during 1941. Where those principles are based on a percentage of outturn of logs, lumber, or primary forest products, the established ceiling price on the product to which it is related shall be used as the basis for the appraisal.

Where appraised value per 4000' log scale is:	Addition per 1000' log scale
\$1.50 and under	\$0.40
\$1.51 to \$2.0050
\$2.01 to \$3.0070
\$3.01 to \$4.0090
\$4.01 to \$5.00	1.05
\$5.01 to \$7.50	1.35
\$7.51 to \$10.00	1.60
\$10.00 and over	1.85

SEC. 6. *Maximum prices for privately-owned western timber.* The maximum price for privately-owned western timber is the appraisal value on the nearest comparable tract of publicly-owned timber, sold since Septem-

ber 1, 1942 plus the additions given in the table in the preceding section. The tract will be considered comparable if it is in the same competitive region, and in any case not more than 500 miles away, and if it is comparable in species, composition, accessibility, density, and grade content.

In choosing the publicly-owned tract to be used for comparison, the basic rule is to take the nearest tract, geographically that meets the general tests of similarity given above.

If the terms of sale or financial arrangements are different from those in the public sale selected for comparison, an appropriate adjustment must be made in the maximum price to reflect the value of the difference in financial terms and basis of measurement.

SEC. 7. Maximum prices for privately-owned western timber where section 6 cannot be applied. When the maximum price for privately-owned western timber cannot be determined under section 6 above, such as sales on percentages of sales of logs, profit sharing, or other arrangements which do not fix the price of the stumpage in specific dollars-and-cents per 1,000 ft., log scale, or when special conditions warrant a different ceiling than that resulting from operation of section 6, the buyer and seller should join in a request by letter to the Lumber Branch, Office of Price Administration, Washington, D. C., for an authorized price. The letter should contain a full description of all of the timber to be sold, including the cruise or estimated amount of timber of each species, the quality of each species and the proposed sales price for each species or group of species. The buyer must furnish evidence that the proposed price will not require

an individual adjustment of the ceilings to which he is subject on logs, lumber, primary forest products or other timber products. If special conditions are the basis for the application, they should be fully described. The Office of Price Administration, by letter or telegram, will either authorize a price or arrangement, or give instructions on how to figure the maximum price. If within 60 days of the receipt of such application the Office of Price Administration has not authorized a price or provided a formula or requested additional information on which such price may be computed, the price or arrangement requested in the application shall be considered approved.

SEC. 8. *Separate computation of non-timber values where land is sold with timber.* If timber is sold together with land, any non-timber rights or interests forming part of the consideration may be separately evaluated. The non-timber rights or interests are not subject to this regulation.

SEC. 9. *Records and reports.* In all transactions involving more than \$1,000 worth of western timber, both seller and purchaser must keep a record of the transaction for two years.

In both public sales and private sales the buyer must file a report for each purchase with the Lumber Branch, Office of Price Administration, Washington, D. C.

The records and reports must include the following:

- (1) The state and county in which the timber is located and a legal description of the location;
- (2) The sales or contract price, and where the selling price differs from the appraised price, also the ap-

praised price for each species, or for each group of species if several having the same price are combined in a price group in the transaction;

(3) A statement of the estimated or actual total volume of timber sold, to be shown by species to the extent that species are separated in the estimate, or in actual log scale if available.

(4) In sales of privately-owned timber the records of buyer and seller and the reports of the buyer shall identify the tract of publicly-owned timber which was used as the basis for calculating maximum prices and shall give the appraisal value of the publicly-owned tract.

(5) In transactions involving both publicly-owned and privately-owned timber, the records and reports should indicate to what extent, if any, values other than timber values constituted a part of the consideration involved, together with data in support of these separate values.

SEC. 10. *Petitions for amendment.* Any person seeking an amendment of any provision of this regulation may file a petition for amendment in accordance with the provisions of Revised Procedural Regulation No. 1 issued by the Office of Price Administration.

SEC. 11. *Enforcement.* Persons violating any provisions of this regulation are subject to the criminal penalties, civil enforcement actions and suits for treble damages provided for by the Emergency Price Control Act of 1942.

NOTE: All reporting and record-keeping requirements of this regulation have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

This regulation shall become effective August 31, 1943.

Issued this 25th day of August, 1943.

CHESTER BOWLES,
Acting Administrator.

Appendix C

ENABLING ACT[®]

AN ACT to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments, and to be admitted into the Union on an equal footing with the original states, and to make donations of public lands to such states. (Approved February 22, 1889.)

SECTION 10. That upon the admission of each of said states into the Union, sections numbered sixteen and thirty-six in every township of said proposed states, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior: * * *

SECTION 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one

[®]25 Stat. at Large 676; Remington's Revised Statutes of Washington, Volume 1, page 331.

section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

SECTION 13. That five per centum of the proceeds of the sales of public lands lying within said states which shall be sold by the United States subsequent to the admission of said states into the Union, after deducting all the expenses incident to the same, shall be paid to the said states, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within the said states respectively.

SECTION 14. * * * None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section eleven of this act. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said states respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. * * *

Appendix D
STATE CONSTITUTION ①
ARTICLE III

SECTION 1. The executive department shall consist of a governor, lieutenant-governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands, who shall be severally chosen by the qualified electors of the state at the same time and place of voting as for the members of the legislature.

ARTICLE IX

SECTION 1. It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

SECTION 2. The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools.

SECTION 3. The principal of the common school fund shall remain permanent and irreducible. The said fund shall be derived from the following named sources, to wit: Appropriations and donations by the state to this fund; donations and bequests by individuals to the state or public for common schools; the proceeds of lands and

①Remington's Revised Statutes of Washington, Volume 1, page 347.

other property which revert to the state by escheat and forfeiture; the proceeds of all property granted to the state, when the purpose of the grant is not specified or is uncertain; funds accumulated in the treasury of the state for the disbursement of which provision has not been made by law; the proceeds of the sale of timber, stone, minerals, or other property from school and state lands, other than those granted for specific purposes; all moneys received from persons appropriating timber, stone, minerals or other property from school and state lands other than those granted for specific purposes; and all moneys other than rental recovered from persons trespassing on said lands; five per centum of the proceeds of the sale of public lands lying within the state which shall be sold by the United States subsequent to the admission of the state into the Union, as approved by section thirteen of the act of congress enabling the admission of the state into the Union; the principal of all funds arising from the sale of lands and other property which have been and hereafter may be granted to the state for the support of the common schools. The legislature may make further provisions for enlarging said fund. The interest accruing on said land; together with all rentals and other revenues derived therefrom; and from lands and other property devoted to the common school fund, shall be exclusively applied to the current use of the common schools.

SECTION 4. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

SECTION 5. All losses to the permanent common school or any other state educational fund which shall be occasioned by defalcation, mismanagement, or fraud of

the agents or officers controlling or managing the same shall be audited by the proper authorities of the state. The amount so audited shall be a permanent funded debt against the state in favor of the particular fund sustaining such loss, upon which not less than six per cent annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized and limited elsewhere in this constitution.

ARTICLE XVI

SECTION 1. All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interests disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

SECTION 2. None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder; and the value thereof, less the improvements, shall, before any sale, be appraised by a board of appraisers, to be provided by law, the terms of payment also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land. In estimating the value of such lands for disposal, the value of improvements thereon shall be excluded. Provided, that the sale of all school and university land heretofore made by the com-

missioners of any county or the university commissioners, when the purchase price has been paid in good faith, may be confirmed by the legislature.

SECTION 3. No more than one-fourth of the land granted to the state for educational purposes shall be sold prior to January first, eighteen hundred and ninety-five, and not more than one-half prior to January first, nineteen hundred and five: Provided, that nothing herein shall be so construed as to prevent the state from selling the timber or stone off of any of the state lands in such manner and on such terms as may be prescribed by law: And provided further, that no sale of timber lands shall be valid unless the full value of such lands is paid or secured to the state.

SECTION 5, *as amended by Amendment 1*. None of the permanent school fund of this state shall ever be loaned to private persons or corporations, but it may be invested in national, state, county, municipal, or school district bonds.

Appendix E**STATE STATUTES**

Section 46, chapter 255, Laws of Washington, 1927 (Remington's Revised Statutes of Washington, section 7797-46).

When the commissioner of public lands shall have decided to sell any lot, block, tract, or tracts of state lands, except capitol building lands and university lands, or any tide or shore lands, or the timber, fallen timber, stone, gravel, or other valuable material thereon, or with the consent of the board of regents of the University of Washington, shall have decided to sell any lot, block, tract or tracts of university lands, or the timber, fallen timber, stone, gravel or other valuable material, thereon, it shall be the duty of the commissioner of public lands to forthwith fix the date of sale, which date shall be on the first Tuesday of the month in which the sale is to be had, and no sale shall be had in any month in which the first Tuesday shall fall on a legal holiday, and the commissioner shall give notice of the sale by advertisement published once a week for five weeks next before the time he shall name in said notice, in at least one newspaper published and of general circulation in the county in which the whole, or any part of any lot, block or tract of land to be sold or the material upon which is to be sold is situated, and by causing a copy of said notice to be posted in a conspicuous place in the office of the county auditor of such county, which notice shall specify the place, time and terms of sale and describe with particularity each parcel of land to be sold, or from which valuable materials are to be sold, and state the appraised value thereof.

Section 50, chapter 255, Laws of Washington, 1927 (Remington's Revised Statutes of Washington, section 7797-50).

All sales shall be at public auction to the highest bidder, on the terms prescribed by law and as specified in the notice hereinbefore provided, and no land or materials shall be sold for less than its appraised value.

Section 53, chapter 255, Laws of Washington, 1927 (Remington's Revised Statutes of Washington, section 7797-53).

If no affidavit showing that the interest of the state in such sale was injuriously affected by fraud or collusion, shall be filed with the commissioner of public lands within ten days from the receipt of the report of the county auditor conducting the sale of any state lands, or tide or shore lands, or timber, fallen timber, stone, gravel or other valuable material thereon, and it shall appear from such report that the sale was fairly conducted, that the purchaser was the highest bidder at such sale, and that his bid was not less than the appraised value of the property sold, and if the commissioner shall be satisfied that the lands, or material, sold would not, upon being readvertised and offered for sale, sell for at least ten per cent more than the price at which it shall have been sold, and that the payment, required by law to be made at the time of making the sale, has been made, and that the best interests of the state may be subserved thereby, the commissioner of public lands shall enter upon his records a confirmation of sale and thereupon issue to the purchaser a contract of sale, deed or bill of sale, as the case may be, as in this act provided.

Appendix F

FEDERAL STATUTES

Section 233 of the Judicial Code (28 U. S. C., section 341).

SECTION 341. (Judicial Code, section 233.) **Original jurisdiction.** The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party. (R. S. § 687; Mar. 3, 1911, c. 231, § 233. 36 Stat. 1156.)

Section 266 of the Judicial Code (28 U. S. C., section 380).

SECTION 380. (Judicial Code, section 266, amended.) **Same; alleged unconstitutionality of State statutes; appeal to Supreme Court.** No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice

of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing, and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory in-

junction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit. (June 18, 1910, c. 309, § 17, 36 Stat. 557; Mar. 3, 1911, c. 231, § 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, § 1, 43 Stat. 938.)

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 261

OTTO A. CASE, AS COMMISSIONER OF PUBLIC LANDS
OF THE STATE OF WASHINGTON, PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF
PRICE ADMINISTRATION, AND SOUNDVIEW PULP
COMPANY, A WASHINGTON CORPORATION

MEMORANDUM FOR THE PRICE ADMINISTRATOR

The decision below rests on alternative grounds:

(1) that in an injunction suit brought by the Price Administrator against the Land Commissioner of the State of Washington pursuant to Section 205. (a) of the Emergency Price Control Act (56 Stat. 23, 50 U. S. C. App. Sec. 901 et seq.) to enforce compliance with the provisions of Maximum Price Regulation No. 460 (8 F. R. 11850), which establishes maximum prices for the sale of "western timber" (including that owned by a State), the "exclusive jurisdiction" provisions of the Act (Section 204 (d)) preclude consideration of any question as to asserted lack of statutory au-

(1)

thority in the Administrator to regulate the prices of state-owned timber; (2) that the statutory definition of "persons" subject to the Act comprehends states and their political subdivisions (Section 302 (h)).

In respect of the latter holding, the decision below is in conflict with that of the Supreme Court of Idaho in *Twin Falls County, Idaho v. Hulbert*, 156 Pac. 2d 319, pending in this Court on petition for a writ of certiorari by Hulbert and the Price Administrator as intervener (No. 238, this Term). Review is sought in the *Twin Falls* case on the basis of this conflict of decisions and the importance of the question. In addition, as the petition in the instant case points out, a similar and even more direct conflict exists between the decision below and that of the Supreme Court of Washington in *Soundview Pulp Co. v. Taylor*, 21 Wash. 2d 261, 150 Pac. 2d 839.

While the Price Administrator is not in accord with petitioner's contention that the case would merit review on the basis of the alternative ruling below giving effect to the exclusive jurisdiction provisions, or on the basis of other questions presented,¹ nevertheless the existence of a conflict on

¹ I. e., the constitutionality of federal wartime price control as applied to state school-land timber sales; the jurisdictional questions arising under Sections 233 and 266 of the Judicial Code; and the question as to the authority of attorneys for the Price Administrator to institute the action (Pet. 16-17).

the issue of construction does, it is believed, warrant review of the case. Accordingly we do not oppose the granting of certiorari.

Respectfully submitted.

✓ HAROLD JUDSON,
Acting Solicitor General.

✓ RICHARD H. FIELD,
General Counsel,
Office of Price Administration.

SEPTEMBER 1945.

FILE COPY

No. 261

IN THE

SUPREME COURT

**OF THE
UNITED STATES**

OCTOBER TERM, 1945

**OTTO A. CASE, as Commissioner of Public Lands
of the State of Washington, Petitioner,**

v.

**CHESTER BOWLES, Administrator, Office of
Price Administration, and SOUNDVIEW
PULP COMPANY, a Washington corporation,
Respondents.**

**ON CERTIORARI
TO REVIEW THE DECISION OF THE UNITED
STATES CIRCUIT COURT OF APPEALS,
NINTH CIRCUIT**

**BRIEF OF RESPONDENT
SOUNDVIEW PULP COMPANY**

**W. Z. KERR,
E. S. MCCORD,
S. N. GREENLEAF,**

*Attorneys for Respondent,
Soundview Pulp Company.*

Office and Postoffice Address: 1309 Hoge Bldg., Seattle 4, Wash.

Office - Supreme Court, U. S.

JAN 3 1946

**CHARLES ELMORE CRUMLEY
CLERK**

No. 261

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1945

OTTO A. CASE, as Commissioner of Public Lands
of the State of Washington, Petitioner,

v.

CHESTER BOWLES, Administrator, Office of
Price Administration, and SOUNDVIEW
PULP COMPANY, a Washington corporation,
Respondents.

ON CERTIORARI
TO REVIEW THE DECISION OF THE UNITED
STATES CIRCUIT COURT OF APPEALS,
NINTH CIRCUIT

BRIEF OF RESPONDENT
SOUNDVIEW PULP COMPANY

W. Z. KERR,
E. S. McCORD,
S. N. GREENLEAF,

Attorneys for Respondent,
Soundview Pulp Company.

Office and Postoffice Address: 1309 Hoge Bldg., Seattle 4, Wash.

SUBJECT INDEX

	Page
I. OPINIONS BELOW	5
II. JURISDICTION	6
III. STATEMENT OF THE CASE	7
IV. ANSWERING ARGUMENT	8
Petitioner's Point A: Attorneys for the Price Administrator Are Not Authorized to Institute Actions for the United States Independent of the Department of Justice	11
Petitioner's Point B: The United States Supreme Court Has Exclusive Jurisdiction of This case	12
Petitioner's Point C: If the District Court Does Have Jurisdiction, It May Be Exercised Only by a Three-Judge Court	12
Petitioner's Point D: This Court May Determine Whether the Price Control Act Is Applicable to States Even Though the Subject Regulation Has Never Been Challenged in the Emergency Court of Appeals	13
Petitioner's Point E: Congress Never Intended the Price Control Act to Apply to States	19
Petitioner's Point F: If the Price Control Act Includes the States, It Does Not Apply to a Sale of Timber From Its School Sections	20
APPENDIX A	
Statement of Considerations for M. P. R. 460	25

TABLE OF CASES CITED

	Page
Beecher v. Wetherby, 95 U. S. 517.....	16
Bowles v. Willingham, 321 U. S. 503.....	13
Elmonte Investment Co. v. Schaeffer Bros. Logging Co., 192 Wash. 1, 72 P. (2d) 311.....	16
France v. Deep River Logging Co., 79 Wash. 336, 140 Pac. 361.....	16
Georgia v. Evans, 316 U. S. 159.....	12
Massachusetts State Grange v. Benton, 272 U. S. 525.....	12
Mayo v. Lakelands Highlands Canning Co., 309 U. S. 310.....	12
Miller v. United States, 294 U. S. 435.....	14
Milwaukee Land Co. v. Poe, 31 F. (2d) 733.....	16
Northern Pacific Railway v. Paine, 119 U. S. 561.....	16
State ex rel. Forks Shingle Co. v. Martin, 196 Wash. 494, 83 P. (2d) 755.....	16
Texas v. Florida, 306 U. S. 398.....	12
United States v. West Virginia, 295 U. S. 463.....	12
Yakus v. United States, 321 U. S. 414.....	13

TABLE OF STATUTES AND FEDERAL REGULATIONS

Emergency Price Control Act (56 Stat. 23, 50 U. S. C. App. 901, et seq.).....	
Section 1(c)	11
Section 2(a)	16
Section 2(b)	16
Section 2(g)	16
Section 4	11
Section 205(a)	11
Section 205(b)	11
Maximum Price Regulation 460.....	17, 18, 20
Section 1	16
Section 2	16
Section 3	16
Section 4	—

MISCELLANEOUS

Forest Resources of Douglas Fir Region, Misc. Publication No. 389 (1940)	18, 21
Statement of Considerations	18, 20

No. 261

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1945

OTTO A. CASE, as Commissioner of Public Lands
of the State of Washington, Petitioner,

v.

CHESTER BOWLES, Administrator, Office of
Price Administration, and SOUNDVIEW
PULP COMPANY, a Washington corporation,
Respondents.

ON CERTIORARI
TO REVIEW THE DECISION OF THE UNITED
STATES CIRCUIT COURT OF APPEALS,
NINTH CIRCUIT

BRIEF OF RESPONDENT
SOUNDVIEW PULP COMPANY

I.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for
the Ninth Circuit is reported in 149 Fed. (2d) 777

and appears in the transcript of the record, p. 71.

The oral opinion of the District Court is not reported but appears in the transcript of the record, p. 56.

The opinion of the Supreme Court of the State of Washington is reported in 21 Wash. (2d) 561; 150 Pac. (2d) 839.

II.

JURISDICTION

This Respondent agrees with the Petitioner that the jurisdiction of this Court has been properly invoked for the reasons set forth at p. 11 and p. 21 of Brief of Petitioner.

III.

STATEMENT OF THE CASE

This Respondent concurs in the statement of the case set forth in Petitioner's Brief, pp. 12 to 18. The facts are not in dispute. (Judgment of District Court, R. p. 39.)

The chronological development of the facts is important and is nowhere more succinctly stated than in the admitted affirmative defense in the answer of the Respondent Soundview Pulp Company. (R. p. 39.) The pleading is as follows:

"That the defendant, Jack Taylor, as Commissioner of Public Lands of the State of Washington, offered for sale the timber on Section 36, Township 36 North, Range 5 East, W. M. situated in Skagit County, at public auction to the highest bidder on November 23, 1943; that the defendant, the Soundview Pulp Company, appeared at said sale and offered to buy the said timber for \$77,853.25 but was advised by the county auditor of Skagit County conducting said sale on behalf of the defendant, Jack Taylor, that the bidding at the said sale must continue and the property would be sold to the highest bidder, irrespective of the application of Maximum Price Regulation 460, solely on account of the instructions of the defendant, Jack Taylor, regulating the bidding at said sale and over the protest of this defendant and the defendant made the highest

bid at said sale, the sum of \$86,336.39, and the defendant was advised by the defendant, Jack Taylor, that he intended to confirm the said sale at said price to the defendant, Soundview Pulp Company; that immediately following the said sale, this defendant conferred with the Seattle Office of Price Administration and was advised on November 26, 1943, by the Seattle Office of the Price Administrator, that the bid was considered in excess of the ceiling price for timber as provided under Maximum Price Administration 460 and was further advised that if the sale was consummated on said bid, the price administrator would hold this defendant responsible for violation of the Emergency Price Control Act of 1942.

"That under the statutes of the State of Washington, if the sale was confirmed before the legality of the defendant's bid could be determined, the purchase money tendered by the plaintiff to the defendant, Jack Taylor, would be paid into the state treasury for the school fund and could not be withdrawn or returned to the plaintiff if the sale was found to be in violation of law without an appropriation of the legislature of the State of Washington, which appropriation would rest in the sound discretion of said legislative body.

"This defendant being without adequate remedy at law, in an endeavor to secure a determination and declaration of its rights, status and legal relations with the State of Washington, filed an action in the Superior Court of Thurston County, entitled *Soundview*

Pulp Company, a corporation, Plaintiff *v. Jack Taylor*, Commissioner of Public Lands of the State of Washington, Defendant, Cause No. 20703, and secured temporary restraining order against the confirmation of said sale and this defendant caused a certified copy of the complaint and a temporary restraining order properly certified, to be delivered to the Price Administrator so that the Price Administrator might intervene in said action.

"That said action in said Superior Court of Thurston County was heard and determined, the Price Administrator appearing only as *amicus curiae* at the hearing thereof and the said action resulted in a judgment, that this defendant's action be dismissed and the moneys paid by it to the defendant, Jack Taylor, to-wit: \$86,336.39, be returned to this defendant.

"That the defendant, Jack Taylor, appealed the said judgment to the Supreme Court of the State of Washington and on said appeal the plaintiff appeared as *amicus curiae*, submitted oral argument and brief and the Supreme Court of the State of Washington on July 22, 1944, rendered its opinion, reversed the judgment appealed from and directed the Superior Court of Thurston County to enter its judgment in accordance with said opinion.

"That in view of the present action this defendant is still in doubt as to its rights, status and legal relations with the State of Washington and the United States Government as they are affected by the constitution and statutes of

the State of Washington and the statutes, orders and regulations of the United States and desire only to act in a legal manner as a court of competent jurisdiction shall declare those rights.

“Wherefore, this defendant prays that this court determine its jurisdiction of the subject matter and the persons who are parties hereto; that the preliminary injunction issued in this cause be continued in force and effect until the jurisdiction of this court is determined and the said cause heard on the merits and that upon final hearing thereof, if it be determined that the proposed sale is in violation of any law as claimed by the plaintiff herein that a permanent injunction be entered restraining said sale and directing the defendant, Jack Taylor, to return to this defendant, the tendered purchase price of \$86,336.39; but if it be determined that said sale is a lawful sale, that the said action be dismissed and that this defendant have any other relief that may be meet and proper in the premises.”

IV.

ANSWERING ARGUMENT

Petitioner's Point A. Attorneys for Price Administrator Are Not Authorized to Institute Actions for the United States Independent of the Department of Justice. (Petitioner's Brief, p. 26.) :

Unless authority to employ attorneys is found in the Price Control Act, actions of the present kind must be brought by the Department of Justice.

Sections 205(a) and 205(b) do justify actions under the control of special attorneys of the Price Administrator where the action is against a "person . . . engaged or . . . about to engage in any acts or practices which constitute . . . a violation of any provision of Section 4 of the Act."

Is the State a "person" within the definition of the Act?

Since the question of whether or not the Act is applicable at all to a State under Section 1(c) and whether or not the statutory definition of "person" includes a State are primary questions involved on the merits (Petitioner's Brief, p. 48), it is submitted that the point is not here essential to your present determination of the issues.

Petitioner's Point B. The United States Supreme Court Has Exclusive Jurisdiction of This Case. (Petitioner's Brief, p. 31.)

That this is a suit between the Federal Government and the State of Washington, this Respondent has no doubt, but it is also a suit against this Respondent, a private corporation. The Federal District Court clearly had jurisdiction of this Respondent, which was a proper and necessary party. This would not militate against the original jurisdiction of this Court. (*United States v. West Virginia*, 295 U. S. 463.) This should be particularly true where the equitable powers of the court are to be exercised to prevent undue hardship. (*Texas v. Florida*, 306 U. S. 398.)

But here again we are confronted with the question: Is the State a "person" within the meaning of the Act? If it is, probably the District Court as well as this court has jurisdiction of this cause. (*Georgia v. Evans*, 316 U. S. 159.)

Petitioner's Point C. If the District Court Does Have Jurisdiction It May Be Exercised Only by a Three-Judge Court. (Petitioner's Brief, p. 38.)

This Respondent agrees with the State that this was a proper case for convening a court of three judges. (*Mayo v. Lakelands Highlands Canning Company*, 309 U. S. 310; *Massachusetts State Grange v. Benton*, 272 U. S. 525.)

The District Court, however, refused to grant the temporary injunction for lack of substance in the bill. Three judges could have given the State no more relief. Any error seems not prejudicial.

Petitioner's Point D. This Court May Determine Whether the Price Control Act Is Applicable to States Even Though the Subject Regulation Has Never Been Challenged in the Emergency Court of Appeals. (Petitioner's Brief, p. 42.)

This Respondent agrees with the Petitioner's argument on this point.

The Emergency Price Control Act has been held constitutional. Courts are not authorized to question the validity of a regulation except in the manner provided in the statute where the regulation is issued in the field open to the Administrator.

Yakus v. United States, 321 U. S. 414;

Bowles v. Willingham, 321 U. S. 503.

Justice Stone in *Yakus v. United States*, 414, p. 425, says:

"Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administration officer is to find but

upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."

If a regulation is beyond the field open to the Administrator (as the State Court and the District Court have held in the present instance), can that matter only be raised in the special review proceedings provided by the Act? Judge Stone's language in the *Yakus* case seems capable of the construction that the question may be answered in the negative. Justice Rutledge's dissenting opinion in the *Yakus* case and his concurring opinion in *Bowles v. Willingham*, *supra*, clearly indicates that a regulation may be invalid on its face. Justice Douglas in the *Bowles v. Willingham*, page 516, refers to "a zone for the exercise of discretion by the Administrator." (See also *Miller v. U. S.*, 294 U. S. 435, at 440.)

There must be a line of demarcation between regulations which alter, extend and redefine terms used in the Act beyond the authority delegated by Congress to make valid regulations, and those which do not. The Petitioner's illustration at page 45 of its brief is most apt. Books are excepted from the definition of "commodity." Could the price ad-

ministrator enlarge the definition of "commodity" to include books? In his Statement of Considerations, he might say: I find speculation in books has resulted in unreasonably high prices for books. The high prices that now prevail for books has resulted in speculation and high price in book paper. In order to regulate and control the price of book paper, I now find it necessary to define books to include only scientific books and to exclude novels. Therefore "commodity" includes all books except scientific books.

Recently the President has asked Congress for authority to regulate the sale price of housing accommodations. No one has supposed that the Act grants to the price administrator such authority. Following the illustration as to books, could the price administrator find that purchasers of housing are speculating in houses with the result that the increased price for houses has put pressure on the price of lumber? Because the price of lumber is getting out of hand, could the price administrator find that it is advisable to control the sale price of houses where the house represents more than 60% of the value of the house and land? Having so found, could the administrator then redefine commodity to include houses? We submit that the answer is obvious; that such a regulation could upon

its face be invalid. Yet that is exactly what the price administrator has done by Sections 1, 2 and 3 of Regulation 460.

The authority to make regulations in the Act is found in Section 2 (a) and 2 (b) and empowers the administrator to make regulations to establish maximum prices of commodities and rents for housing accommodations in critical areas. Section 2 (g) only enlarges this general power to the extent that is necessary to prevent circumvention and evasion.

Standing timber is real property and not a commodity defined in the Act:

Milwaukee Land Co. v. Poe, 31 Fed. (2d) 733;

France v. Deep River Logging Co., 79 Wash. 336;

El Monte Investment Co. v. Schafer Bros. Logging Co., 192 Wash. 1;

State ex rel. Forks Shingle Co. v. Martin, 196 Wash. 494, 512;

Beecher v. Wetherby, 95 U. S. 517;

Northern Pacific Railway Co. v. Paine, 119 U. S. 561.

On this same subject, we submit that the statutory definition of "person" should control as to those that can be regulated. We have examined a number of the administrator's regulations of vari-

ous commodities and Regulation 460 is the only one in which we have found a departure from the statutory language. Section 4 of Regulation 460, in defining "person," follows the statutory definition to and including the word "United States," but then gratuitously inserts the word "any State." Otherwise the definition in the regulation is practically identical in wording, and is identical in meaning with the statutory definition.

Drafting of statutes requires the defining of terms and terms need not be defined as used in common parlance, but if Congress has defined terms an administrative official who assumes power to redefine them assumes the power to legislate. Otherwise there would be no limit upon the delegation of legislative authority.

From these examples, it is submitted that the application of the regulation to the present case is one in which the District Court, where this action was filed, was empowered to hold that the regulation was not applicable to the State or the sale of standing timber.

In any event, whether the case arrives here by its present route, or is routed through the Emergency Court of Appeals, the issues on undisputed facts have been finally submitted for decision. The

issue is of extreme importance and should be decided on the merits.

Its importance is evidenced by the Statement of Considerations for Regulation 460. This statement shows that the states of Washington and Oregon own more than 12.55% of the total "saw-timber" stand in the two states. Timber is a scarce commodity. The price administrator in the Statement of Considerations recognized this scarcity. The regulation states: "The regulation will tend to counteract the present tendency for speculative withholding by private owners and will therefore serve to augment the supply of timber which is *badly needed during the present emergency.*"

A casual reading of the report on Depletion in the Department of Agriculture's report, "Forest Resources of Douglas-Fir Region" (Misc. Publications No. 389 (1940), pages 43 to 52), can leave no doubt in anyone's mind that standing timber will grow scarcer for a number of years.

Since the Land Commissioner of the State of Washington, under the decision of its Supreme Court cannot constitutionally sell standing school timber except as he did in this case, and would be liable on his official bond if he sold the timber as the regulation requires, it is quite obvious that the

regulation has operated to withdraw a large block of timber from sale and make standing timber scarcer.

There is another reason why this case could not go to the Emergency Court of Appeals. The state sale occurred before the Act was amended to allow access to the Emergency Court of Appeals at any time. The initial suit in the state court by this respondent was instituted before that amendment of the Act.

When the price administrator began the present action in the Federal District Court, neither this Respondent, nor the state had reason to go to the Emergency Court of Appeals. The State Supreme Court had already held the Act inapplicable. The District Court followed the State Supreme Court so that neither this Respondent nor the State was in a position to appeal to the Emergency Court. It is therefore submitted that Petitioner's Point D is well taken.

Petitioner's Point E. Congress Never Intended the Price Control Act to Apply to States. (Petitioner's Brief, page 48.)

This Respondent is in agreement with the Petitioner on this portion of its brief.

Petitioner's Point F. If the Price Control Act Includes the States It Does Not Apply to a Sale of Timber From Its School Sections. (Petitioner's Brief, page 59.)

This Respondent is in agreement with the Petitioner on this portion of its brief.

The Statement of Considerations for Regulation 460 explains the method that has been developed in the past by which the western states set appraisals on the value of timber which are minimum prices established for bidding at public auctions. This practice is to safeguard the State and the school funds against a sale not resulting in a fair price. It also prevents collusive bidding. The development of this method of appraisal has not operated as a limitation on the constitutional and statutory requirement of public bidding. It is a practice in further aid of realizing the highest price possible to the State and the school funds for its timber.

The Price Control Act contains nowhere any suggestion that Congress intended to grant to any committee, deputy administrator or to the price administrator authority to seize on this convenient appraisal machinery and say that school timber should be sold at the appraisal price fixed therefor as a minimum bid price.

That the administrator allowed some leeway

above that appraisal is of little significance. If he was delegated the power he claims, he could have fixed a minimum price below the appraised figure. The fixing of the price of logs and other commodities has resulted in "independent loggers gradually passing out of the picture in the West" (See Statement of Considerations). Just so, Regulation 460 has resulted in the State of Washington making no sales of its school timber since November, 1943.

Again from a realistic point of view, it seems highly improbable that Congress could have intended to change its entire policy toward the school stands of timber in the Western states. In the sale of timber from the national forest, the federal government has been generous in its treatment of the schools. Twenty-five per cent of all receipts derived from the sale or use of resources of each national forest is transmitted to the state or states containing the forest for expenditure on public schools and public roads. (Forest Resources of Douglas-Fir Region, Agriculture Department Bulletin No. 489, page 40.)

Is it conceivable that Congress intended to delegate to the price administrator, which is in reality a delegation to a deputy dealing with logs and lumber, authority to upset the system that has been

in existence for 100 years? We confess that we cannot concur in the decision of the Circuit Court.

In conclusion, this Respondent again reiterates that its principal desire is to secure a final determination of the issue. It is willing and desirous to complete the present sale if it may legally do so. The loss of this particular purchase is not important to it. This Respondent has not taken sides actively in this litigation until the preparation of this brief. It has never seemed proper that its agent should have been put in the embarrassing and critical position he found himself on the day of the sale. The timber involved was practically surrounded by the holdings of this Respondent. That in itself made the purchase highly advisable. Isolated logging increases the fire hazard and increases the danger of storm loss to adjoining timber. The agent of this Respondent was advised by the State Land Commissioner that he would lose the timber if he stopped bidding. To make a momentary decision on the advice of a state official certainly could involve no moral wrong. That it was a difficult decision is evidenced by the fact that fourteen judges have already considered this case and have decided, seven in favor of the State and seven in favor of the Federal Government. To do other

than protect this Respondent from criminal charges or loss of the funds tendered in payment for the timber would, we submit, be a gross miscarriage of justice.

Respectfully submitted,

W. Z. KERR,

E. S. McCORD,

S. N. GREENLEAF,

*Attorneys for Respondent,
Soundview Pulp Company.*

APPENDIX A

[STATEMENT OF CONSIDERATIONS FOR REGULATION
No. 460]

SUMMARY OF REGULATION

This regulation fixes maximum prices for sales of timber (stumpage), in that part of the United States west of the 100th meridian. It relates to all transactions in which the primary purpose is the acquisition of timber for commercial conversion into timber products.

The maximum price for sales of publicly-owned timber is the appraised value of the timber, as determined by the public agency selling the timber, plus certain specified additions over the appraisal price. These additions permit bids over the appraised price ranging from \$0.40 on stumpage appraised at \$1.50 or less to \$1.85 on stumpage valued at \$10.00 or more. The reason for these additions is that the appraisals are appraisals of minimum values, and therefore there must be a permissible margin recognized between the minimum and maximum value. Public agencies must follow the appraisal principles used by them during 1941 and take into account the fact that operators cannot sell their product at prices in excess of applicable ceiling prices.

For sales of private timber, the maximum price is the appraised value (with allowable additions) of the tract of comparable public timber nearest the privately-owned tract in question. The regulation outlines specifically the methods by which private sales of standing timber can be priced. They are based on comparable sales of the same species of comparable quality and accessibility on the nearest tract of publicly-owned standing timber.

In comparing sales of privately-owned timber with sales of publicly-owned timber, the maximum price may be adjusted where the conditions of sale differ substantially from those in comparable sales of publicly-owned timber. If the method of comparison with publicly-owned timber cannot be applied, the buyer and seller may apply to the Office of Price Administration for an authorized price. For this purpose certain requirements are outlined in the regulation.

All buyers of stumpage subject to the regulation must keep records of all purchases of standing timber made subsequent to the issuance of this regulation. Sellers of timber must submit a description of each sale involving more than \$1,000 to the Office of Price Administration. _____

COVERAGE OF REGULATION

The western states covered by this regulation account for 70 per cent of all standing timber in the United States in 1938.

The States of Washington and Oregon alone contain about 40 per cent of the saw-timber stand of the United States. A large part of this timber, however, is not accessible at the present time. This is especially true of the portion owned by public agencies in the West, which includes about 60 per cent of the total stand of timber in the twelve western states.

The estimated 1938 distribution by ownership of saw-timber stands, in million board feet, was as follows:

TABLE 1

Type of Ownership	Columbia River Basin Washington, Washington and Oregon, and Oregon (West of the (East of the South Fork (Cascades) Cascades) California Mountains)			
	Million Board Feet			
Publicly Owned				
National Forest	208,035	452,584	85,449	100,280
Indian Reservations	5,012	23,652	2,897	6,983
States and Other Public Ownership	89,152	21,663	775	9,498
Total	302,239	497,899	89,121	116,761
Privately Owned				
Farms	11,914	1,634	2,800	124
Industrial	288,099	80,850	121,559	8,107
Total	300,010	82,484	124,359	8,231
Grand Total	602,249	580,383	213,480	124,992

(Source: U. S. Forest Service.)

"Forest Lands of the United States"; "Report of Joint Committee on Forestry". The footage amounted to 1,221,339 million board feet out of 1,763,651 million board feet in 1938.

The following is a summary of estimated distribution of saw-timber stands by species in 1938:

TABLE II.

Species	Total	Columbia	Southern	
		River	Rocky	
		Basin	California	Mountain Plains
		Million Board Feet		
Softwoods				
Douglas fir	489,905	426,464	51,400	12,041
Ponderosa Pine	224,904	129,462	54,451	40,956
True Fir	121,737	72,908	40,740	8,089
Western Hemlock	115,551	115,551		
Spruce	62,821	26,664		36,157
Redwood	39,150		39,150	
Lodgepole Pine	38,620	12,043		26,577
Western Larch	25,306	25,306		
Sugar Pine	24,684	4,895	19,789	
Western White Pine	16,333	16,333		
Other	55,171	46,050	7,950	1,171
Total	1,216,182	887,676	213,480	124,991
Hardwoods	4,957	4,956		1
Grand Total	1,221,139	882,632	213,480	124,992
Percentage Publicly Owned	41.8	56.6	41.7	93.2
Total United States	1,763,651			

(Source: U. S. Forest Service)

The total volume of standing timber sold annually in the twelve Western States for the years 1940, 1941 and 1942 is estimated in Table III. The record for private sales is based on a survey conducted annually by the Forest Service, Department of Agriculture, and the record is incomplete by an indeterminate amount, as the survey was conducted on a voluntary basis. It is believed, however, to include by far the major part of private stumpage transactions.

TABLE III

SALES OF STANDING TIMBER IN TWELVE WESTERN STATES

	1942	1941	1940
	Million Board Feet		
Private Sales	12,250	10,621	9,838
National Forest	1,794	1,663	1,432
Oregon and California Re- vested Land Administration	318	464	500
Indian Reservations	542	not known	not known
States	not known	not known	not known

After making a rough allowance for State sales and some private sales probably not reported, sales for 1940, 1941, and 1942 were about 13, 14 and 16 billion board feet, respectively. The year 1942 thus shows a considerable increase in the volume of stumpage transactions. The figures given for national forest sales represent timber actually cut during the year, irrespective of the year the contract was signed. These sales are handled on a pay-as-you-cut basis and the same is essentially true of other public sales. Private transactions, on the contrary, simply indicate that timber changed hands and indicate nothing as to when it may be cut. Some timber has changed hands several times. Private purchases in the West tend to be large—there were some very large deals in 1942—and only in part are made for immediate conversion. Probably not more than a quarter of annual private stumpage sales are converted to logs and other products within a year from date of purchase.

PURPOSE OF REGULATION

The primary purpose of this regulation is to prevent unwarranted advances in the price of standing timber that will in turn exert undue pressure on existing log and lumber ceilings. An increasing tendency is evident for prices to be offered that will force stumpage to a level which the average operator cannot meet under existing ceilings and continue production. This regulation does not contemplate any general roll-back of appraisal values of stumpage from present levels. The reasons for this particular kind of price action are, therefore, in part preventive. It is believed that action at this time will lessen if not obviate the need for more stringent price action subsequently.

Practically all public agencies sell timber and timberlands at public auction after having determined the minimum price acceptable. These appraised prices are based on current prices of timber products, together with current costs of logging and sawmilling, and are not intended to exert undue pressure on lumber and log ceilings. However, keen competition for stumpage often results in prices far in excess of the advertised minimum being bid for public timber, and these prices do cause unwarranted pressure on log and lumber ceilings.

While the actual proportion of these high bids is not large in the West, their effect on stumpage prices is disproportionately great because public timber prices are widely known. It seems necessary—and the public agencies concerned concur generally in this—that a curb should be placed on the bidding up of public timber that will keep the bid price as close to the advertised price as is consistent with allowing a reasonable margin for the difference between a minimum and maximum price.

Private stumpage prices in the West are strongly influenced by public sale prices, which probably constitute the best general measure of fair current value of standing timber. This regulation makes use of this fact by employing public stumpage prices, which are also capable of being controlled fairly easily, as a yardstick for judging proper private stumpage prices. By establishing and emphasizing public prices as a standard comparison, it is believed that private stumpage prices will generally stay in line. If they do not, more stringent action may have to be taken.

BACKGROUND AND PRICE HISTORY

The first formal price actions covering lumber, plywood, and millwork, were issued by the Office of Price Administration during the summer of 1941.

At that time it was hoped that establishment of product price ceilings would control prices backward over intermediate and primary raw materials entering into the product. Logs and stumpage were excluded from the General Maximum Price Regulation.

Price pressure on logs, the intermediate material for the production of a wide range of forest products, soon developed, however, on the West Coast where there is an extensive and well developed log market. In June, 1942, general price control over West Coast logs was established through Maximum Price Regulation 161. Similar pressures developed elsewhere, particularly where production of veneer and other specialty products was involved. The high value of these specialty products in comparison with the value of the logs from which they come has permitted a comparatively wide profit margin in conversion in relation to sawlogs. Under pressure of a keen wartime demand, much of this margin went into logs with the result that prices of logs suitable for these specialty products skyrocketed in late 1942 and in turn pressed sawlog prices upward. Prime grade hardwood logs in the East were brought under dollars-and-cents ceilings in February, 1943, by MPR 313 and general control was extended to the sale of all logs

through MPR 346 issued in March, 1943. This regulation rolled back the prices individual purchasers could pay for all logs not covered by MPR 161 and MPR 313 to the individual's September-October, 1942 level. Provision was made in MPR 348 for log purchasers to join in making area pricing proposals, and these are now being translated into dollars-and-cents ceilings for logs.

However, log ceiling price regulations cannot by themselves control stumpage prices. In fact, they may create an unbalanced situation between producers of forest products that is in part transmitted to stumpage. Many manufacturing plants own or buy their stumpage, and either log it themselves or contract for the logging. The logging contractor has to compete with the integrated manufacturing plants, which may or may not be in a better position to pay higher prices for either stumpage or logging, depending on the margin permitted on the end product by specific maximum price regulations, the General Maximum Price Regulation, or the existence of cost-plus-fixed-fee contracts entered into with public procurement agencies. In fact, the Independent Logger has been gradually passing from the picture in the West. Inability to meet competitive stumpage prices is one factor contributing to his elimination.

Another reason for increased stumpage prices is the incentive given under present tax laws for manufacturing companies owning timber purchased at lower than current market prices to withhold their timber from conversion and to purchase stumpage for their current supply of logs. Under present tax laws, companies owning timber acquired at low cost are required to use low depletion charges in figuring costs. On the other hand, if stumpage is bought at high current prices, the operator is permitted to charge high depletion rates for tax purposes. Operators, therefore, prefer, so far as financial considerations are concerned, to hold back their own timber and avoid what amounts to partial liquidation of their capital assets represented by stumpage. The temptation also exists to sell stumpage at high current prices, paying a comparatively low capital-gain tax, and to acquire other stumpage for current cutting with concomitant high depletion charges. It is not within the power of the Office of Price Administration to control these practices.

TABLE IV

Comparison of Douglas Fir Stumpage
Log and Lumber Realization Indices

1939-1943

(Third quarter 1939 = 100)

		Stumpage ¹	Log ²	Lumber ³
1939	1st quarter	100	102	96
	2nd quarter		102	98
	3rd quarter		100	100
	4th quarter		105	110
1940	1st quarter	111	104	105
	2nd quarter		104	105
	3rd quarter		105	110
	4th quarter		113	128
1941	1st quarter	133		
	2nd quarter		122	136
	3rd quarter		136	135
	4th quarter		144	167
1942	1st quarter	166	148	167
	2nd quarter		157	176
	3rd quarter		164	183
	4th quarter		164	191
1943	1st quarter	210	170	193

¹Based on average annual sales prices received by the Oregon and California Revested Land Administration, U. S. Department of the Interior. The first quarter of 1943 includes January and February sales only. The index based on the average prices at which stumpage was cut would have been 121.7 in 1941, 146.3 in 1942 and 165.1 in 1943.

²Pacific Northwest Loggers Association quarterly report. The index is based on average realization in the Puget Sound, Grays Harbor and Willamette Areas.

³Average monthly realization as reported by the West Coast Lumbermen's Association.

Analysis of the price history of stumpage is seriously complicated by the fact that no two tracts

of timber are exactly alike and recurrent cuttings on the same area within a short space of time are infrequent. —Even though comparisons are limited to the same forest region and species, wide price differences occur between individual transactions because of differences in accessibility and quality. Furthermore, particular conditions of sale—whether part or all of the stand is to be cut, requirements as to care in logging to avoid fire and injury to reserved trees, etc.—also influence prices. Some sales are made on a lump sum basis, with or without the land, and prices by species and volume are not separately established at all. Some timber is bought for immediate conversion and some for future conversion and in the latter case a carrying charge for the investment involved enters in and reduces the sale price.

The above limitations prevent the making of any exact analysis of stumpage price history. However, the following comparative realization indices for Douglas-fir are presented as generally indicative of the trend.

The comparison afforded by Table IV above indicates that the percentage rise in stumpage value has about kept pace with increases in log and lumber realization with some tendency for stumpage

prices to forge ahead, relatively, within the past few months.

This tendency for stumpage prices to increase disproportionately has been observed elsewhere than in the data cited. It is the primary purpose of this regulation to curb these price increases.

In the past, sales of stumpage by public agencies have usually been made at the advertised minimum price. However, since the increased war demand for lumber production, stumpage has been at a premium. The bid prices at public sales have increasingly exceeded the appraised prices, as shown by the comparison of National Forest sales prices and appraised prices on Table V. While in 1940 bids for Douglas Fir stumpage in Western Washington and Western Oregon were no higher than the average appraised prices they exceeded the appraised values by \$2.01 per thousand feet log scale or by 44 per cent in 1942.

TABLE V
Douglas Fir Stumpage Prices and Indices
1939-1942

Sales Made by National Forests Stumpage ¹ Western Oregon and Western Washington	1942	1941	1940
Average Sales Prices.....	\$6.60	\$4.52	\$1.77
Index	367	255	100
Average Appraised Prices.....	\$4.59	\$3.46	\$1.77
Index	259	195	100
Excess of Sales (Bid Price) over the Appraised Prices.....	\$2.01	\$1.06	None

¹Bids and advertised prices reported by Forest Service, U. S. Department of Agriculture.

On the basis of reports submitted by its members, the Pacific Northwest Loggers Association has estimated that 25 per cent of the logs in Western Washington and Western Oregon is cut from currently purchased stumpage. The other 75 per cent is cut directly by the owners of the stumpage. The 1941 total log production of 10,244 million feet log scale in this territory is an indication of the amount of standing timber felled annually. It is apparent that the volume of timber cut from currently purchased stumpage is so large that the excess of bid over appraised prices may endanger prevailing lumber and timber product ceilings.

APPRAISAL OF STANDING TIMBER

Some discussion of the problem and methods of appraising the value of standing timber is necessary to an understanding of this regulation.

The market value of standing timber is normally a residual one. In general outline, it is the difference between the expected sales realization value of the end product and cost of production including a margin for profit and risk. Stumpage values can be either negative or positive. If negative, it simply means that it costs more to get the timber out than it is worth. Much timber on the National Forests, including some of the very high quality, has a negative value due to inaccessibility.

Stumpage values are almost entirely unrelated to the cost of production (the growing of the timber crop) since timber over most of the United States, and this is particularly true in the West, is still a natural resource, "a gift of Nature." Cost of stumpage production enters in as a minor factor only insofar as interest, taxes, fire protection, and other holding costs are involved.

When land is sold with timber, generally all value is ascribed to the timber, because most cut-over-land is a liability, not worth the taxes. Sales of public timber in the West rarely involve the sale

of real estate, but in effect are in the form of licenses or contracts to cut. On the other hand, private sales usually involve an outright sale of land on which timber stands. In most private transactions the land itself has no value, but there are exceptions. Accordingly, provision is made for separate evaluation of interests not attributable to timber, if they form a part of the consideration for the purchase.

JUSTIFICATION OF PRICE ACTION

The primary objective of this regulation is to protect price ceilings on logs, lumber and other timber products. Recent excessive competition between buyers has driven stumpage prices to levels which threaten lumber and other timber product ceilings. With stumpage regulated (logs and labor are now under control), uncontrollable increases in costs of timber products will thus be restricted to a few remaining factors, particularly labor efficiency and shortage of labor and equipment.

The effect of the regulation is to limit price competition in stumpage sales. The regulation does not purport to roll back prices to pre-war levels or to those in effect during any prior period. The regulation does, however, require the public agencies to use appraisal principles which were in force dur-

ing 1941. This means, primarily, that the public agencies have to base their appraisal value on average end-product realizations as computed under current Office of Price Administration maximum price regulations for lumber, railroad ties, mine timbers, plywood, poles and pilings, wood pulp, and other timber products. Prices of privately owned stumpage are to be determined by comparison with public sales and are expected to remain in proper relationship.

The maximum prices established by this regulation will probably be well above the prices on lump-sum sales made for cutting in the distant future. The present value of any appraisal will necessarily be lower in such long-term sales than the values arrived at in sales made for immediate cutting purposes.

The regulation will tend to counteract present tendencies for speculative withholding by private owners and will, therefore, serve to augment the supply of timber which is badly needed during the present emergency.

Upon consideration of the data and other facts presented in this Statement of Considerations and after several meetings and discussions with representative public and private timber owners, the

Price Administrator has determined that this Western Timber regulation is generally fair and equitable, is in accordance with the provisions of the Emergency Price Control Act of 1942, as amended, and with Executive Orders Nos. 9250 and 9328 by the President of the United States and will effectuate the purpose of said Act and Executive Orders.

Issued this 25th day of August, 1943.

CHESTER BOWLES,
Acting Administrator.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulation involved	3
Statement	9
Summary of argument	19
Argument	20
I. Section 204 (d) precludes any process of determining the validity of a regulation by construing the statute	22
II. The Act is not unconstitutional insofar as it authorizes the regulation of sales prices of timber on state-owned school lands	32
III. The case does not fall within the exclusive jurisdiction of the Supreme Court	36
IV. The case does not fall within the jurisdiction of a three-judge district court under Section 266 of the Judicial Code	38
V. Attorneys appointed by the Price Administrator are authorized to institute and prosecute civil actions on behalf of the Administrator independently of the Department of Justice	40
Conclusion	43
Appendix—Opinion of the Emergency Court of Appeals in <i>City of Dallas v. Bowles</i>	44

CITATIONS

Cases:

<i>Ames v. Kansas</i> , 111 U. S. 449	37
<i>Bowles v. American Brewery Co.</i> , 146 F. 2d 842	25
<i>Bowles v. Carothers</i> , decided December, 1945	30
<i>Bowles v. Cullen</i> , 148 F. 2d 621	30
<i>Bowles v. Lake Lucerne Plaza, Inc.</i> , 148 F. 2d 967, certiorari denied, May 17, 1945	30
<i>Bowles v. Meyers</i> , 149 F. 2d 440	30
<i>Bowles v. Seminole Rock and Sand Co.</i> , 325 U. S. 410	25
<i>Bowles v. Texas Liquor Control Board</i> , 148 F. 2d 265	27, 30
<i>Bowles v. Willingham</i> , 321 U. S. 503	22, 25, 30
<i>Bransford, Ex parte</i> , 310 U. S. 354	20, 39
<i>Brown v. Cummins Distilleries Corp.</i> , 53 F. Supp. 659	25
<i>Brown v. Lee</i> , 51 F. Supp. 85	25
<i>Brown v. Liniafski</i> , 53 F. Supp. 513	27
<i>Brown v. W. T. Grant Co.</i> , 53 F. Supp. 182	25

Cases—Continued

	Page
<i>Buder, In re</i> , 271 U. S. 461	39
<i>Cullen v. Bowles</i> , 148 F. 2d 621	26
<i>Dallas, City of v. Bowles</i> , decided Dec. 20, 1945	22, 29, 44
<i>Farmer's Gin Co. v. Haynes</i> , 54 Fed. Supp. 43	39
<i>Henderson v. Burd</i> , 133 F. 2d 515	30
<i>Hobbs v. Pollack</i> , 280 U. S. 168	39
<i>Hulbert and Bowles, v. Twin Falls County</i> , No. 238	26
<i>Lockerty v. Phillips</i> , 319 U. S. 182	22
<i>Mine Safety Appliances Co. v. Forrestal</i> , decided Dec. 10, 1945	36
<i>Minnesota, State of v. United States</i> , 125 F. 2d 636	37
<i>North Dakota, v. Chicago and N. W. Ry. Co.</i> , 257 U. S. 485	37
<i>Query v. United States</i> , 316 U. S. 486	40
<i>Reeces v. Bowles</i> , 151 F. 2d 16, certiorari denied January 2, 1946	27, 30
<i>Rosenzweig v. United States</i> , 144 F. 2d 30, certiorari denied, 323 U. S. 764	25
<i>Securities and Exchange Commission v. Robert Collier & Co.</i> , 76 F. 2d 939	41
<i>Shrier v. United States</i> , 149 F. 2d 606, certiorari denied, Oct. 8, 1945	25
<i>Soundview Pulp Company v. Taylor</i> , 21 Wash. 2d 261, 150 P. 2d 839	11, 12
<i>Sutherland v. International Insurance Co.</i> , 43 F. 2d 969	41
<i>Texas v. Interstate Commerce Commission</i> , 258 U. S. 158	37
<i>United States v. California</i> , 297 U. S. 175	20, 37
<i>United States v. Central Packing Corp.</i> , 51 F. Supp. 813	25
<i>United States v. Louisiana</i> , 123 U. S. 32	37
<i>United States v. Gregory</i> , 1 OPA Op. and Dec. 974	25
<i>United States v. Montana</i> , 134 F. 2d 194	37
<i>United States v. Pepper Bros.</i> , 142 F. 2d 340	25
<i>Yaku v. United States</i> , 321 U. S. 414	22, 25, 27, 32, 33
Constitution and Statutes:	
U. S. Constitution:	
Article III	36
Article VI	38
Act of February 22, 1889, 25 Stat. 676	7
Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. Supp. IV, Sec. 901, et seq.) as amended:	
Sec. 1	3, 4
Sec. 2	3, 32, 33
Sec. 4	4, 5, 32
Sec. 201	4, 40
Sec. 203	5, 22, 31
Sec. 204	2, 5, 19, 21, 22, 23, 25, 30, 31, 32, 34
Sec. 205	2, 5, 20, 30, 31, 32, 37, 38, 40, 41
Sec. 302	2, 3, 4
Sec. 305	5, 36

Statutes—Continued—

Judicial Code (28 U. S. C. 341):

Sec. 233	2, 5, 16, 20, 37
Sec. 266	3, 6, 16, 20, 38
Remington's Rev. Stat. (Wash.) Vol. 1, pp. 347, et seq.	7
Remington's Rev. Stat. (Wash.), Secs. 7797-46, 7797-50, 7797-53	7
Washington State Constitution (Art. III, Sec. 1, Arts. IX, XVI)	7

Miscellaneous:

Maximum Price Regulation No. 460, issued August 25, 1943 (8 Fed. Reg. 11850, as amended)	35
Sec. 1	7
Sec. 2	7
Sec. 3	8
Sec. 4	8
Sec. 5	8, 9
Sec. 6	8
Sec. 7	9
OPA Service, Desk Book "Lumber," p. 42, 308	9
Sen. Rep. No. 931, pp. 7-8, 24, 77th Cong., 2d Sess	24, 42
Statement of Considerations accompanying Maximum Price Regulation No. 460, OPA Service, p. 39: 2415	35

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 261

OTTO A. CASE, AS COMMISSIONER OF PUBLIC LANDS
OF THE STATE OF WASHINGTON, PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF
PRICE ADMINISTRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PRICE ADMINISTRATOR

OPINIONS BELOW

The District Court did not render a formal opinion, but orally stated the reasons for its judgment in open court on August 4, 1944. The reporter's transcript of the oral opinion appears at R. 56-64. The opinion of the Circuit Court of Appeals (R. 71-77) is reported at 149 F. (2d) 777.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered May 28, 1945

(1).

(R. 77-78). The petition for a writ of certiorari was filed in this Court on July 26, 1945. Certiorari was granted on October 15, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1945.

QUESTIONS PRESENTED

1. Whether, in an injunction suit brought by the Price Administrator against the Land Commissioner of the State of Washington pursuant to Section 205 (a) of the Emergency Price Control Act, to enforce compliance with the provisions of a regulation establishing maximum prices for the sale of "western timber" (including that owned by a state), the exclusive jurisdiction provisions of the Act (Section 204 (d)) preclude consideration of any question as to asserted lack of statutory authority in the Administrator to regulate the prices of state-owned timber.

2. Whether, if the question be open in this proceeding, the statutory definition of "persons" subject to the Act (Sec. 302 (h)) comprehends states and their political subdivisions when engaged in "governmental" activities.

3. Whether the Act is constitutional if so construed to include states within the definition of "persons" subject to the Act.

4. Whether this Court has exclusive and original jurisdiction of this proceeding in view of the provisions of Section 233 of the Judicial Code.

5. Whether a three-judge court should have been convoked in this proceeding under the provisions of Section 266 of the Judicial Code in view of the constitutional and statutory provisions of the State of Washington which require sales of state timber to be made at public auction to the highest bidder.

6. Whether attorneys for the Price Administrator were without authority to institute and prosecute this proceeding independently of the Department of Justice.

STATUTES AND REGULATION INVOLVED

1. The Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App., Supp. IV, Sec. 901 et seq.), as amended by the Stabilization Extension Act of 1944 (58 Stat. 640, 50 U. S. C. App., Supp. IV, Sec. 925) and by the Stabilization Extension Act of 1945 (Pub. Law No. 108, 79th Cong., 1st Sess.). Copies of the Act as amended will be handed to the Court at the argument. The pertinent provisions may be summarized as follows:

Sections 1, 2 (a), 2 (c) and 2 (g), together with the pertinent provisions of Section 302, the "Definitions" Section, pertain to the issuance of maximum price regulations. Section 2 (a) authorizes the Price Administrator by regulation or order to establish maximum prices for "a commodity or commodities" when the prices thereof "in [his] judgment * * * have risen or threaten to rise to an extent or in a manner in-

consistent with the purposes of this Act." The declaration of statutory purposes is contained in Section 1 (a). The term "commodity" is defined in Section 302 (c) as comprehensively including "articles, products, and materials" and "services," with certain named exceptions none of which are here applicable. The category of "persons" whose dealings in commodities are subject to the Act is defined in Section 302 (h) in comprehensive and non-exceptional terms, and specifically includes "the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency." Section 1 (c) prescribes the geographical reach of the Act as embracing "the United States, its Territories and possessions, and the District of Columbia."

Section 4 (a) makes it "unlawful * * * for any person" to violate any maximum price regulation.

Section 201 (a) authorizes attorneys appointed by the Administrator to "appear for and represent the Administrator in any case in any court."

Section 201 (d) authorizes the Administrator to issue regulations deemed necessary or proper to carry out the purposes of the Act. Regulations governing the procedures for administrative

review of maximum price regulations are based on this provision and on Section 203 (a).

Sections 203 and 204 establish the exclusive statutory procedure for administrative and judicial review of price regulations. Section 204 (d) explicitly prohibits all courts except the Emergency Court of Appeals (created by Section 204 (c)) and, on review therefrom, this Court from passing upon the validity of the regulations in any suit.

Section 205 (a); pursuant to which the Price Administrator instituted this suit, provides for institution of injunction proceedings to restrain violations of the prohibitions contained in Section 4 (a) "whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act." Section 205 (c) provides for exercise of jurisdiction by courts in enforcement suits.

Section 305 supersedes conflicting prior statutes.

2. Section 233 of the Judicial Code (28 U. S. C. 341) provides in part as follows:

The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction.

* * * (R. S. Sec. 687, March 3, 1911,
c. 231, sec. 233, 36 Stat. 1156.)

3. Section 266 of the Judicial Code (28 U. S. C. 380) provides, in pertinent part, as follows:

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his as-

sistance to hear and determine the application two other judges: * * *

4. The pertinent provisions of the Enabling Act providing for the admission to the Union of the State of Washington (Act of Feb. 22, 1889, 25 Stat. 676), and of the State Constitution (Art. III, Sec. 1, Arts. IX, XVI; Remington's Rev. Stat. (Wash.) Vol. 1, pp. 347 et seq.) and statutes (Remington's Rev. Stat. (Wash.), Secs. 7797-46, 7797-50, 7797-53), which pertain to the disposal of state timber, are set forth in the Appendix to Petitioner's brief, at pp. 26-33.

5. Maximum Price Regulation No. 460, issued August 25, 1943, effective August 31, 1943 (8 Fed. Reg. 11850), establishes maximum prices for western timber. The pertinent provisions will be summarized.

Section 1 of the Regulation prohibits sales or purchases of western timber at prices higher than those established by the Regulation.

Section 2 describes the "products" ("western timber") covered by the Regulation, to-wit, "all timber (whether green or dead, standing or down, of all species, classes and sizes, where the timber has not been severed from the stump), west of the 100th meridian of longitude in the continental limits of the United States".

¹The words "in the continental limits of the United States" were added by Amendment 1, effective September 22, 1943 (8 Fed. Reg. 13023.)

Section 3 describes the types of "transactions" covered by the Regulation, to-wit (insofar as here pertinent), "all sales of western timber if the primary purpose of the purchase is the acquisition of timber for commercial conversion into timber products."

Section 4 declares which "persons" are subject to the Regulation, to-wit, "any person who makes the kind of sales or purchase covered by this Regulation * * *"; and, further: "The term 'person' includes: * * * the United States, any State or any government, or any of its political subdivisions; or any agency of the foregoing."

Section 5 establishes methods for computing the maximum legal prices of publicly owned timber. The computation is made by taking the "appraised value" ("based on the appraisal principles used by the public agency during 1941") plus specific dollars-and-cents additions, set forth in Section 5, for timber sold per 1000' log scale; and, for timber sold on a lineal foot basis, the computation is made by adding a flat 20 percent to the "appraised value."

Section 6 provides that maximum prices for privately-owned timber shall be determined by taking the "appraisal value on the nearest comparable tract of publicly owned timber, sold by the United States Forest Service of the Department

² The provisions pertaining to sales on a lineal foot basis were added by Amendment 2, effective June 17, 1944 (9 Fed. Reg. 6457).

of Agriculture or by the Department of the Interior since September 1, 1942, plus the additions given in the table in the preceding section [Section 5]".³ The maximum prices for publicly-owned timber are thus made a yardstick for all sales of western timber.⁴

STATEMENT

This case arose out of an attempted sale of state-owned timber by petitioner at prices in excess of those established by Maximum Price Regulation No. 460. The district court dismissed the Price Administrator's complaint for injunc-

³ The words "by the United States Forestry Service of the Department of Agriculture or by the Department of Interior", were added to the Regulation by Amendment 3, issued April 7, 1945, effective April 12, 1945 (10 F. R. 3870). Previously the Regulation referred merely to "publicly-owned timber sold since September 1, 1942". As explained in the official Statement of Considerations which accompanied the issuance of Amendment 3, the change was made "for administrative reasons only." Experience under the Regulation had shown that appraisals of federal disposal agencies were more uniform and consistent than those of state and local agencies, and that copies of appraisals of timber offered for sale by the latter were not regularly furnished to the Administrator. OPA Service, Desk Book "Lumber", p. 42, 308.

⁴ For privately-owned timber to which the comparability provisions of Section 6 cannot be applied, Section 7 provides special pricing methods.

Until Amendment 3 was adopted in April, 1945, as noted in the preceding footnote, state timber was one of the categories of "publicly-owned timber" whose sale prices were operative in the yardstick method thus provided. The elimination of state sales as an element in the yardstick does not affect, of course, the maximum price provisions applicable to timber sales by states under Section 5 of the Regulation.

tion to restrain the attempted sale (R. 38), and the court below reversed (R. 71-78). The facts of the case are not in dispute (R. 39, 54), and may be summarized as follows:⁵

The Administrator filed his complaint, motion for preliminary injunction and temporary restraining order, and supporting affidavit in the District Court on July 28, 1944. (R. 2-11.) The essential allegations, which were fully admitted and were also supplemented in certain details by the defendants (R. 19, 20, 21-25, 28-32), were that, on November 23, 1943, at a public auction held by defendant Jack Taylor, as State Land Commissioner, the defendant Soundview Pulp Company, one of two bidders, bid the sum of \$86,336.39, for timber located on Section 36, Township 36 North, Range 5 East, W. M., Skagit County, Washington; that the above sum was paid to defendant Jack Taylor; that the maximum legal price for said timber under Maximum Price Regulation No. 460 was \$77,853.25; that on or about November 26, 1943, defendant Jack Taylor notified defendant Soundview that its bid was the highest and best bid; that in De-

⁵ The defendants named in the Administrator's complaint were Jack Taylor (the petitioner's predecessor in office as State Land Commissioner), and the Soundview Pulp Company, a bidder at the state timber auction (R. 2-3). Petitioner was substituted for Jack Taylor as a party in this proceeding by order of the court below entered January 23, 1945 (R. 68). The Soundview Pulp Company has not applied for review to this Court. See p. 15, fn. 10, *infra*.

cember, 1943, after the Seattle District Office of Price Administration had been informed of the foregoing facts and had advised Soundview that consummation of the sale at the bid price would constitute a violation of the Regulation and of the Act, separate actions were instituted by Soundview and by the unsuccessful bidder, Coos Bay Pulp Corporation, in the Superior Court for Thurston County, State of Washington, seeking an adjudication as to the legality of Soundview's bid and of the proposed transfer of the timber to Soundview;⁶ that these suits, being consolidated for trial, resulted in a decree enjoining Jack Taylor from accepting Soundview's

⁶Three suits were filed in the Superior Court: (1) by Soundview, filed December 1, 1943, praying for an injunction to restrain Jack Taylor from confirming the sale or issuing a bill of sale until the legality of Soundview's bid could be determined, and for a declaratory judgment determining the rights, status and legal relations of the parties; (2) by Coos Bay Pulp Corporation, filed December 4, 1943, for a writ of mandate to compel Jack Taylor to confirm the sale in Coos Bay and issue to that corporation a bill of sale; (3) by Coos Bay on December 6, 1943, praying for an injunction to restrain Jack Taylor from confirming the sale or issuing a bill of sale to Soundview. Coos Bay and Soundview had made alternating competitive bids at prices over the ceiling price, but at the termination of the bidding Coos Bay had withdrawn its over-ceiling bids, and in its suit in the Superior Court it sought confirmation of the sale to it at the maximum legal prices. The Price Administrator did not become a party to these proceedings. He made an appearance as *amicus curiae*. (R. 9, 23, 29-31; *Soundview Pulp Company v. Taylor*, 21 Wash. 2d 261, 150 P. 2d 839 (1944).)

bid or consummating the sale to Soundview, and directing him to consummate the sale to Coos Bay at the maximum legal price;⁷ that thereafter on July 22, 1944, on appeal taken by Jack Taylor to the Supreme Court of the State of Washington, the judgment of the Superior Court was reversed with directions to dismiss the actions brought by Coos Bay;⁸ that instead of waiting the statutory 30-day period for the issuance of the remittitur of the State Supreme Court the defendant Jack Taylor entered into a stipulation for the immediate issuance of the remittitur; that, at the time of the filing of the Price Administrator's complaint in the District Court (July 28, 1944) the defendant Jack Taylor proposed to complete the sale to Soundview without delay; that the defendant Jack Taylor had received a number of other bids for additional parcels of state timber and was preparing to consummate these sales at prices in excess of those established by the Regulation; and that in the judgment of the Price Administrator the defendants Soundview and Jack Taylor had engaged in and were about to engage in acts and practices which constituted and would constitute a violation of Section 4 (a) of the Act and of the provisions of

⁷ See *Soundview Pulp Co. v. Taylor*, *supra*, fn. 6.

⁸ The Price Administrator did not become a party to that appeal. He made an appearance as *amicus curiae*. (R. 23-31; *Soundview Pulp Co. v. Taylor*, *supra*, fn. 6.)

Maximum Price Regulation No. 460. (R. 3-4, 8-10, 19, 20, 21-25, 28-32.)

The complaint prayed for a preliminary and final injunction and a temporary restraining order restraining both defendants from consummating the proposed transaction or arranging any other transfer of title, for a consideration in excess of the maximum price, and from otherwise violating or attempting to perform any act in violation of Maximum Price Regulation No. 460; and for such other and further relief as might seem just and equitable.*

On August 8, 1944 defendant Jack Taylor filed a motion to dismiss (R. 17-19) and an answer raising issues of law as follows: (1) That the complaint fails to state a cause of action; (2) that jurisdiction over the subject matter and over the person of defendant Jack Taylor is vested exclusively in the United States Supreme Court; (3) that if jurisdiction lies in the district court it must be exercised by a three-judge court; (4) that the Price Administrator instituted this suit without obtaining the approval of the Attorney General of the United States; (5) that Maximum Price Regulation No. 460 has no application to the sale in question; (6) that the Supreme Court of the State of Washington had ruled in an ap-

* On July 28, 1944, the district court granted the Administrator's application for a temporary restraining order and order to show cause for preliminary injunction (R. 11-15).

peal from the consolidated actions brought by the
 bidders herein against defendant Jack Taylor
 that the Emergency Price Control Act of 1942
 was not applicable to the sale in question or to
 any other sales of timber made by defendant Jack
 Taylor on behalf of the State of Washington in
 the performance of his governmental functions
 ("first affirmative defense"); (7) that the Act
 "does not by its terms or intendment apply to
 sales made by a sovereign state in the perform-
 ance of its governmental functions, for the reason
 that said act does not purport to include such sales
 and that if the act so intended then the act vio-
 lates the Fifth and Tenth Amendments to the
 Constitution of the United States" ("second af-
 firmative defense") (R. 26); (8) that inasmuch
 as the Act provides "that no punishment pro-
 vided by this Act shall apply to the United
 States, or to any such government, political sub-
 division, or agency" and inasmuch as the Price
 Administrator is seeking to enjoin Jack Taylor
 acting in his official capacity as Land Commis-
 sioner of the State of Washington, the Adminis-
 trator "is thereby seeking a remedy against the
 said defendant which, by the terms of the act it-
 self, has been denied plaintiff" ("third affirmative
 defense") (R. 26). In addition, defendant Jack
 Taylor averred in his answer that the timber in
 question was located upon land held in trust by the
 State of Washington for school purposes, and ac-
 quired by the State under Section 10 of the En-

abling Act (25 Stat. 676); that the sale in question was held in response to a directive issued on September 15, 1943 by the Western Log and Timber Administrator of the War Production Board ordering that the timber in question be immediately made available for sale; that the sale was made at public auction in accordance with Article XVI, Section 2 of the State Constitution; that in addition to the sale in question the defendant Jack Taylor had ~~ordered~~^{there} four other tracts of timber for sale on which he had received bids in excess of the ceiling price as computed under Maximum Price Regulation No. 460; and that none of these sales had been completed (R. 17-27).¹⁰

All issues of law being submitted (there being no issues of fact), full hearing of the cause on the merits was held before the district court on August 11, 1944 (R. 35-36, 38-39). The court in a series of preliminary rulings overruled defendant Taylor's jurisdictional contentions, i. e., those

¹⁰ The defendant Soundview Pulp Co. on August 11, 1944, filed a separate answer (R. 27-33) indicating that it did not desire to engage in any dispute with the Price Administrator on any issue of law or fact, but desired merely that the matters involved be adjudicated, inasmuch as the defendant was "still in doubt as to its rights, status and legal relations with the State of Washington and the United States Government as they are affected by the constitution and statutes of the State of Washington and the statutes, orders and regulations of the United States and desire only to act in a legal manner as a court of competent jurisdiction shall declare those rights" (R. 32).

which raised issues as to the exclusive jurisdiction of the Supreme Court (28 U. S. C. 341), as to the necessity of convening a three-judge court (28 U. S. C. 380), and as to the institution of suit by the Price Administrator without the approval of the Department of Justice (R. 36, 39, 40, 54-56).

The court thereafter heard argument on the remaining issues of law (R. 36, 38-39). These turned upon the question whether, in view of the exclusive jurisdiction provisions of Section 204 (d) of the Act, the district court could pass upon defendant Taylor's contention that the Act, in its grant of authority to the Price Administrator, does not authorize the issuance of any regulation or order controlling the sale prices of school land timber owned by the State of Washington. The district court's rulings on these issues were announced in its oral decision (R. 56-64), minute entries (R. 36), and judgment (R. 38-41). The court ruled that,"

(1) Maximum Price Regulation No. 460 in terms applies to the subject matter of this suit, i. e., it applies to school land

" In view of the fact that these rulings, in our view, display plain contradictions and inconsistencies as among each other, and inasmuch as a dispute is indicated before this Court over the question whether the district court ruled on the validity of the Regulation (Petitioner's brief, p. 42), it seems to us necessary to set forth the rulings in the present Statement in such a manner as to facilitate analysis of the district court's action.

timber of the State of Washington (R. 62).

(2) The court is without jurisdiction to pass upon the validity of Maximum Price Regulation No. 460 (R. 56-57, 62-63).

(3) The Regulation is valid (R. 36, 57).

(4) The Act is constitutional (R. 36, 57-58).

(5) The court has jurisdiction to construe the Act inasmuch as the court's injunctive authority is invoked, and it must therefore be free to interpret the statute upon which rests its authority to grant this extraordinary remedy (R. 57-63).

(6) If in exercising such an authority to construe the Act, the court adopts a construction which "affects ultimately adversely or otherwise, a regulation thereunder, that is a condition which can not be avoided * * *" (R. 57).

(7) As construed by the court, the Act (Sections 2 (a), 302 (c) and 302 (h)) does not comprehend within its grant of authority to the Price Administrator any authority to set maximum prices for sales of school land timber by the State of Washington made in its sovereign and governmental capacity (R. 36, 39, 58-61, 63).

(8) This construction of the Act rests upon the court's view that the definition of

the term "person" in section 302 (h) of the Act is the only possible basis for including state school land timber within the coverage of the Act; and that in construing this definition ("the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of the foregoing") it must be presumed that Congress could not have intended to bring the federal government into conflict with the authority of the states over public lands held in trust by them for the sovereign and governmental purpose of maintaining their public school systems (R. 58-61, 63).

The judgment of the district court dismissing the complaint was filed August 21, 1944. As heretofore stated, the court overruled defendant Taylor's jurisdictional defenses. Upon stipulation of all parties it was further adjudged and ordered that the defendants should maintain the *status quo* pending further proceedings in this cause. (R. 38-40.)

On May 28, 1945, the circuit court of appeals reversed the judgment of the district court (R. 77-78). As to the related questions of the applicability of the statute to state timber sales and the impact of the exclusive jurisdiction provisions, the decision below rested on alternative grounds: (1) that Section 204 (d) of the Act does not "normally * * * permit of questioning the validity of a regulation by the process of con-

struing the statute"; and (2) that the statutory definition of "persons" subject to the Act comprehend states and their political subdivisions. The court stated that it "hesitated" to rest decision on the first ground alone because "two state courts of last resort, in considering the problem as related to the sale of publicly-owned property, have thought otherwise", and because it was "persuaded" that "Regulation 460 has ample statutory warrant" (R. 74). The circuit court of appeals did not in terms rule on the question of the constitutionality of the Act as so construed, but its reasoning clearly indicated that no doubt was entertained on this point (R. 75-76). It approved the district court's rulings in the Administrator's favor on the defenses addressed to Sections 233 and 266 of the Judicial Code and to the question as to the Administrator's right to maintain the suit by his own attorneys (R. 76-77).

SUMMARY OF ARGUMENT

The contention that the Price Control Act does not authorize the issuance of a regulation dealing with state-owned timber amounts to an attack upon the validity of the regulation and as such is barred by the exclusive jurisdiction provisions of Section 204 (d). The Court does, however, have power to determine the constitutionality of the statute—so long as the asserted defect lies in the Act itself and not in the regulation—and to interpret the Act to the extent necessary to decid-

ing the constitutional question. For reasons set forth in the Government's brief in No. 238, we believe that the Act reaches States and that it may constitutionally do so. We do not believe there are any inconsistent State laws, but this would in any event be immaterial.

The district court had jurisdiction of the case. The case does not fall within the exclusive jurisdiction of this Court as a suit against a State because Section 205 of the Price Control Act itself supersedes Section 233 of the Judicial Code insofar as suits under the Act are concerned. See *United States v. California*, 297 U. S. 175. It was unnecessary to convene a three-judge district court under Section 266 of the Judicial Code because it is not claimed by the plaintiff-respondent that any State statute violates the Constitution but at most that the State laws are inconsistent with a federal statute. *Ex Parte Bransford*, 310 U. S. 354. And the language of the Act, its legislative history and the consistent interpretation by the Administrator and the Department of Justice, all demonstrate that it was proper for the Administrator to appear through his own attorneys in the lower courts.

ARGUMENT

On the merits—whether a state and its subdivisions are subject to regulation under the Emergency Price Control Act—the issue in this case is the same as in *Hulbert and Bowles v. Twin*

Falls County, No. 238. In that case the question arises as to the meaning of a regulation which contains the same definition of "person" as is found in the Price Control Act itself. Since the Court has jurisdiction to interpret the regulation, we have not challenged its authority to determine the point in that case. Here, however, the applicable regulation specifically includes the word "State" in its definition of "person" (see p. 4, *supra*), so that there can be no question as to the meaning of the regulation, but only as to whether it is authorized by the statute, and, if so, whether the statute is constitutional. The Court is not precluded from determining the constitutionality of the statute and, while the Act precludes the courts from determining in this type of case the validity of the regulation by way of construction of the statute, we believe, for the reasons set forth at pp. 32-34, *infra*, that the Court in this case may interpret the Act to the extent necessary to the disposition of the constitutional question. However, because the question of statutory construction is also presented on the record independently of the constitutional question, and indeed has occupied the forefront of this case from its outset, we consider it necessary to set forth the authorities which establish that the distinct questions of construction (when not related to constitutionality) are within the exclusive cognizance of the statutory review forum created by Section 204 of the Act.

The question as to whether states and their subdivisions are subject to the Act is in substance covered by our brief in No. 238, inasmuch as the argument as to the meaning of the statutory language is necessarily the same as the argument as to the meaning of the identical language of the regulation involved in that case. Accordingly, we shall not go into that question here. We wish to point out, however, that since the brief in No. 238 was prepared, the Emergency Court of Appeals has passed upon the validity of the application of a regulation issued under the Act to a political subdivision of a state, and has upheld the Administrator's position. See *City of Dallas v. Bowles*, decided December 20, 1945, reprinted in the Appendix, *infra*, pp. 44-53.

I

SECTION 204 (d) PRECLUDES ANY PROCESS OF DETERMINING THE VALIDITY OF A REGULATION BY CONSTRUING THE STATUTE

The Court is familiar with the procedure established by Sections 203 and 204 of the Act for exclusive review of price and rent regulations, and with the accompanying provisions of Section 204 (d) which preserve the exclusive jurisdiction of the statutory review forum against infringements by other tribunals. *Yakus v. United States*, 321 U. S. 414; *Bowles v. Willingham*, 321 U. S. 503; *Lockerty v. Phillips*, 319 U. S. 182.

It is contended by petitioner that these provisions do not apply where the issue is whether a

regulation is authorized under the statute—in particular, whether a regulation in terms applicable to “States” is allowable under the statutory definition of “person” as including “any other government”. We think it clear that the exclusive jurisdiction provisions protect regulations from review outside the exclusive statutory forum not only where the objection to validity is of a constitutional nature but also where the objection is addressed to the statutory validity of a regulation, *i. e.*, where the question is as to the authority of the Price Administrator to issue a particular regulation under the terms of the statute. The language of Section 204 (d) refers unqualifiedly to the “validity” of regulations. Nothing in the words of the section supports any distinction as between various types of validity or invalidity. Moreover, Section 204 (b) of the Act provides that one of the matters falling within the exclusive purview of the Emergency Court of Appeals is the authority to determine whether a challenged regulation is “in accordance with law.” This question, as well as the question whether a regulation is “arbitrary or capricious”, is reserved for decision exclusively by that court.

If any confirmation were needed to support the plain reading of the statute it may be found in the legislative history, which conclusively establishes that the exclusive purview of the statutory forum comprises contentions as to the statutory invalidity of a regulation. In favorably report-

ing to the Congress the provision of Section 204 (b), just noted, which establishes the scope of review and standards of decision in the Emergency Court of Appeals, the Senate Committee on Banking and Currency stated (77th Cong., 2d Sess., Sen. Rep. No. 931, pp. 7-8, 24) :

The Emergency Court * * * may examine the entire record before the Administrator to determine *whether he has acted in accordance with the statute*, whether the procedure that he has followed is in accordance with accepted standards of due process of law, and whether he has exercised a reasonable judgment on questions committed to his discretion. (pp. 7-8, italics added.)

By applying these standards the [Emergency] Court [of Appeals] has ample power to keep the Administrator within the bounds prescribed by the bill. (p. 24.)

Similarly, in favorably reporting Section 204 (d), the exclusive jurisdiction section, the Senate Committee stated (p. 24) :

Section 204 (d) further provides *expressly* that no court, other than the Emergency Court and the Supreme Court, shall have jurisdiction or power to consider the validity, constitutional *or otherwise*, of any regulation or order issued under Section 2. (p. 24, italics added.)

The decided cases under the Price Control Act have consistently effectuated the intent of Con-

gress that Section 204 (d) should stand as a bar against contentions of statutory invalidity in enforcement suits under this statute. Thus in *Yakus v. United States*, 321 U. S. 414, and *Bowles v. Willingham*, 321 U. S. 503, the exclusive jurisdiction provisions were applied as against a variety of objections addressed to the validity of the regulations involved, including a number of objections of statutory invalidity. *E. g.*, see the *Yakus* decision at 321 U. S. 419, where it is stated that one of the objections involved was "that the Regulation did not conform to the standards prescribed by the Act". To the same effect see *Bowles v. Seminole Rock and Sand Co.*, 325 U. S. 410, 418-419; *United States v. Pepper Bros.*, 142 F. 2d 340 (C. C. A. 3); *Rosensweig v. United States*, 144 F. 2d 30 (C. C. A. 9), certiorari denied, 323 U. S. 764; *Shrier v. United States*, 149 F. 2d 606 (C. C. A. 6), certiorari denied October 8, 1945; *Bowles v. American Brewery Co.*, 146 F. 2d 842, 845 (C. C. A. 4).¹²

¹² Other decisions giving effect to Section 204 (d) against contentions of statutory invalidity are: *Brown v. Cummins Distilleries Corp.*, 53 F. Supp. 659 (W. D. Ky. 1944) (alleged failure to obtain approval of Secretary of Agriculture in accordance with Section 3); *United States v. Central Packing Corp.*, 51 F. Supp. 813 (E. D. N. Y. 1943) (alleged failure to allow a fair margin to processors of agricultural commodities in accordance with Section 3 of the Stabilization Act of 1942, 50 U. S. C. App. 963, 56 Stat. 765); *United States v. Gregory*, 1 OPA Op. and Dec. 974 (W. D. Ky. 1943) (same); *Brown v. W. T. Grant Co.*, 53 F. Supp. 182 (S. D. N. Y. 1943) (alleged failure to consult with industry members in accordance with Section 2 (a)); and *Brown v. Lee*, 51 F. Supp. 85 (S. D. Cal.

In the instant case petitioner is attacking the statutory validity of the regulation on the ground that it attempts to reach a subject matter or a "person" not contemplated within the statutory grant of authority to the Price Administrator. No good reason exists for distinguishing between this type of attack on statutory validity and any other type. Where the question was raised whether the Act was intended to apply to a Chap. X bankruptcy trustee, the Circuit Court of Appeals for the Second Circuit declared:

To import a classification which would remove questions of the validity of regulations from the control of the Emergency Court of Appeals because they are not within the purview of the statute would be bound to lead to endless casuistry and destroy the uniformity of administration which the Emergency Price Control Act was designed to secure. (*Cullen v. Bowles*, 148 F. 2d 621, 624 (C.C. A. 2).)

Similarly, in a case involving sales at public auction of liquors which Texas had acquired by forfeiture from offenders against its laws, the Circuit Court of Appeals for the Fifth Circuit observed:

The further contention is made that Texas is not bound to yield to the regula-

1943) (alleged contravention of the provision of the Act (Section 4 (d)) protecting persons against compulsion to sell or rent). The expressions on the point collected in petitioner's brief (pp. 42-43) are against the weight of authority and are plainly incorrect.

tion because the underlying act of Congress does not apply to it. This seems to be the equivalent of saying that the regulation is invalid because it is not in harmony with and does not tend to effectuate the cardinal purposes of the law. Since exclusive jurisdiction to determine the legality of price regulations promulgated under the Emergency Price Control Act is vested in the Emergency Court of Appeals, the invalidity of the regulation may not be urged as a defense to this action. [Italics added, *Bowles v. Texas Liquor Control Board*, 148 F. 2d 265, 266 (C. C. A. 5).]

So too with the question of whether the exemption in the Act for common carriers applies to companies owning taxicabs who make rental charges therefor to operators of the cabs (*Reeves v. Bowles*, 151 F. 2d 16 (App. D. C.), certiorari denied January 2, 1946), or whether the Act applies to exporters (*Brown v. Liniavski*, 53 F. Supp. 513 (S. D. N. Y.)).

It would defeat the purpose of the exclusive jurisdiction provisions if objections such as those here involved, or other objections addressed to the statutory validity of the regulations, were to be excepted from the scope of the statutory restriction. As is fully brought out by this Court in the *Yakus* case, *supra*, the purposes of the exclusive jurisdiction provisions are the prevention of premature disruptions of price control during the war emergency and the preservation of nation-

wide uniformity in the operation of these controls. Continuity and uniformity of control would be just as surely threatened by decisions in the regularly established courts holding regulations invalid on statutory grounds as by decisions holding them invalid on constitutional grounds. It is particularly important from the point of view of insuring uniformity in the interpretation of the various provisions of the Price Control Act that objections addressed to the statutory validity of regulations, i. e., objections calling for construction of the statute, be confined to a single specialized judicial forum which possesses the essential expertise for the determination of these questions, many of which present complex issues that can only be determined upon a full consideration of the Congressional plan and purposes viewed comprehensively from the standpoint of over-all emergency price control.

It is to be observed, further, that when issues of this type are presented to the Emergency Court of Appeals there is available an underlying factual record containing full data on all pertinent matters. No such factual record was available to the district court, and that court could not direct the parties to assemble such a record without displaying most plainly that it was prepared to act in a matter exclusively reserved to the Emergency Court of Appeals. Such a record in this case might show not only that States were persons within the meaning of the Act but that,

apart from the definition of "person", the products sold by States were "commodities" which Congress intended to be covered.¹³

The State of Washington, in common with any other party subject to an OPA regulation, has full rights under the Price Control Act to challenge the regulations in the statutory review forum. It is noteworthy that the State of New Mexico and the City of Dallas, Texas, have availed themselves of the statutory review procedure in cases involving the precise questions presented here. On October 23, 1942, the State of New Mexico filed a protest with the Price Administrator against Maximum Price Regulation No. 460 contending that the Regulation was invalid on two grounds: (1) that standing timber is not a "commodity" within the meaning of the statute; and (2) that the State is not a "person" within the meaning of the statute. The protest was denied on February 24, 1944. The State of New Mexico has not carried the matter further. (In the matter of State of New Mexico, protest, OPA docket No. 1460-1-P.) The City of Dallas carried its case, involving municipally owned housing, to the Emergency Court of Appeals, which upheld the Administrator's ruling. *City of Dallas v. Bowles*, decided December 20, 1945; *infra*, pp. 44-53.

¹³ Cf. the statutes quoted in the Government's brief in No. 238, pp. 10-11; which were held applicable to states in the absence of any explicit definition.

Petitioner contends that the jurisdictional ban established by Section 204 (d) against consideration of the statutory validity of regulations is inapplicable in equity cases because of the inherent discretionary powers of an equity court. The district court in this case was impressed by this contention (R. 57). We submit, however, that to open up issues as to the validity of regulations in suits for enforcement by injunction would to a large extent defeat the purposes of Section 204 (d). The suggestion is wholly inconsistent with this Court's ruling in *Bowles v. Willingham*, 321 U. S. 503, which was an equity case. See also *Bowles v. Meyers*, 149 F. 2d 440 (C. C. A. 4); *Bowles v. Carothers*, (C. C. A. 5, decided December, 1945). Section 204 (d) has, of course, been applied without qualification in numerous other equity cases. E. g., *Reeves v. Bowles*, 151 F. 2d 16 (D. C. App.), certiorari denied January 2, 1946; *Bowles v. Lake Lucerne Plaza, Inc.*, 148 F. 2d 967 (C. C. A. 5), certiorari denied May 17, 1945; *Bowles v. Texas Liquor Control Board*, 148 F. 2d 265 (C. C. A. 5); *Henderson v. Burd*, 133 F. 2d 515 (C. C. A. 2); *Bowles v. Cullen*, 148 F. 2d 621 (C. C. A. 2).

Finally, petitioner contends that it is necessary to consider whether the state is subject to the Act for the purpose of determining whether the district court as distinct from the Supreme Court (see Point III; p. 36, *infra*), had jurisdiction of the Administrator's suit. Such an inquiry is fore-

closed by Section 204 (d). Section 205 (c) of the Act confers upon the district courts jurisdiction of all enforcement proceedings brought under Section 205 without qualification as to the character or status of the parties to the proceedings. Section 205 (a), under which this proceeding was brought, provides (by reference to Section 4) for the enforcement by injunction of regulations issued under Section 2, and Section 204 (d) denies jurisdiction in such actions to consider the validity of a regulation issued under Section 2. As shown heretofore Section 204 (d) bars all attacks upon the validity of a regulation, including attacks based on a contention that the regulation is not authorized by the Act. The regulation, in other words, must be accepted in all courts, other than the Emergency Court of Appeals (and this Court upon review of the judgments of that court), as being authorized by the Act and valid in all other respects. Therefore, if a party is subject to the regulation he is presumed as a matter of law to be subject to the Act in all proceedings brought under Section 205. This presumption cannot be rebutted except in the statutory review proceedings provided for by Sections 203 and 204 of this Act. It follows, therefore, that the question whether the State is subject to the Act is one that cannot be inquired into for any purpose in this proceeding (except in relation to the constitutional inquiry, see pp. 32-34 *infra*). The State is subject to the regulation—this petitioner does not deny—

and consequently for all the purposes of this case, it must be treated as subject to the Act. Petitioner's suggestion that there is authority here to reach this question by inquiring into the question of jurisdiction is an attempt to lead the Court on a false scent. Certainly this Court, and the courts below, have authority to determine their jurisdiction, but the necessary inquiry here leads to the provisions of Section 205 (a) and 205 (c). And as we have seen, Section 205 (a) is explicitly interlocked with Section 4, which is in turn interlocked with regulations issued under Section 2, which are in turn protected from scrutiny in this proceeding by virtue of Section 204 (d). What petitioner asks this Court to do would just as surely defeat the congressional policy underlying Section 204 (d) as would a direct assault upon the regulation itself.

II

THE ACT IS NOT UNCONSTITUTIONAL IN SO FAR AS IT AUTHORIZES THE REGULATION OF SALES PRICES OF TIMBER ON STATE-OWNED SCHOOL LANDS

As this Court recognized in the *Yakus* case, *supra*, Section 204 (d) does not deny to defendants in enforcement actions under the Act the right to challenge the constitutionality of the basic statute as distinct from the regulation. Persons should not be permitted, of course, to utilize this right as a means of indirectly attacking the regulations themselves instead of the statute. The constitutional objection must actually be aimed at an asserted defect residing within the basic Act

itself and must not be merely couched as an attack on the statute while actually aimed at the particular regulation.

It is usually not difficult to determine whether an objection phrased in constitutional terms reaches the Act or merely veils an attack on the regulation. Issues such as those decided by this Court in the *Yakus* case, *supra*,—i. e., delegation of power, the authority of Congress to regulate prices in wartime—clearly involved the constitutionality of the Act itself. If the Act were unconstitutional on these grounds no valid regulation free from such defects could be framed. Petitioner's objection here that Congress lacks authority to regulate the prices of state school land timber extends beyond any implementing regulation and strikes at the Act itself. If the Act were bad for this reason the Price Administrator could take no valid action whatever in connection with this subject matter.¹⁴

¹⁴ On the other hand, various issues of substantive and procedural due process and issues as to allegedly unconstitutional "takings" may not be passed upon outside the exclusive statutory review forum, because here the seat of the asserted defect would be the regulation itself; regulations free from such asserted confiscatory or procedural defects can be issued within the existing statutory framework. Hence, an objection of this type, even though it be phrased in the form of an attack upon the statute, would actually be addressed to the particular offending regulation. For example, an objection that the statutory standard "generally fair and equitable" (Section 2 (a)) is unconstitutional as authorizing the imposition of unconstitutional property loss could not be decided without first determining whether the particular implementing regulation impinged on the party in such a way as to raise

In disposing of petitioner's constitutional objection the Court is free to construe the statute to the extent necessary to reach the constitutional issue. As shown in Point I, *supra*, a court is not free to interpret the statute in order to determine whether a particular regulation is authorized under the law. Here, however, Section 204 (d) must be read as permitting the Court to construe the Act in order that the Court's power to decide constitutional questions not merely be one to pass upon questions *in vacuo*. Congress was careful to preserve the right of constitutional defense in these cases and its declared policy in this regard should be given effect. The principle should be limited, however, to cases involving the types of constitutional defenses previously mentioned, i. e., those where the asserted constitutional defect resides in the Act itself.

The question as to whether the Act reaches States is covered in the Government's brief in No. 238. The constitutional question is briefly, although we believe adequately, discussed at pages 15-16 of the Government's brief in No. 238, and it is necessary to add but little here.

It will scarcely be denied that the controls over public timber sales established by the Act and

the question sought to be reached, but if this were determined the seat of the constitutional defect would thereby have been found to be the regulation itself. On the other hand, where the question, as here, is one of constitutional authority or coverage *vel non*, the regulation could not be saved by modifying its meaning or application.

the Regulation are within the war powers of Congress. Sales of public timber, as the Statement of Considerations accompanying Maximum Price Regulation No. 460 explains (OPA Service, p. 39: 2415), constitute a significant proportion of Western timber sales; as is there shown, timber prices generally "are strongly influenced by public sale prices", and the regulation is built around the latter prices "as a yardstick".¹⁵ Were state sales beyond the reach of Congress, purchasers would flock to state auctions, bidding sky-high prices for this extremely scarce commodity; and the consequences of this price disruption would be felt in all timber, lumber, and lumber products markets. It is well-known that every inflationary incident produces further inflationary consequences. The liveliness of the competitive bidding between the two lumber companies represented at the auction which led to this suit illustrates what would happen if these state sales were exempted from price control.

Petitioner argues (Br. pp. 59-67) that the Price Control Act, if construed as applicable to states, is inconsistent with federal and state statutes granting to the State of Washington sections of land for school purposes and providing that they shall be sold at public sale. Even if there were an inconsistency, the subsequent federal statute would supersede the earlier enact-

¹⁵ Until April 12, 1943, state sales were included in computing the yardstick formula. (See p. 9, fn. 4, *supra*.)

ments (as Section 305 of the Price Control Act expressly declares), and the Supremacy Clause of the Constitution would make the federal act controlling as against any State laws or constitutional provisions relating to the disposal of school land timber. But in any event, there is no inconsistency. The Price Control Act does not forbid public sales to the highest bidder, but only the acceptance of bids above ceiling prices. The State laws do not require bids to be made at unlawful prices, or, for that matter, at any particular prices. Although the federal Government has similar requirements for public sale to the highest bidder, it has had no difficulty in having such sales made within the ceiling prices.

III

THE CASE DOES NOT FALL WITHIN THE EXCLUSIVE JURISDICTION OF THE SUPREME COURT

Petitioner contends that the district court lacked jurisdiction because the suit is one against a State and within the exclusive jurisdiction of this Court. If we assume that the suit is against the State rather than against a State official acting in his individual capacity (cf. *Mine Safety Appliances Co. v. Forrestal*, decided December 10, 1945), it still does not follow that the district court lacked jurisdiction.

It is well settled that Article III of the Constitution does not of itself grant this Court *exclusive* jurisdiction over cases to which states are

parties. *Ames v. Kansas*, 111 U. S. 449; *United States v. Louisiana*, 123 U. S. 32; *United States v. California*, 297 U. S. 175. This Court's exclusive jurisdiction is derived from the Act of 1789 now incorporated in Section 233 of the Judicial Code, quoted *supra*, pp. 5-6. But it is well established that subsequent statutes have limited this exclusive grant of authority by implication, so that in many cases the district courts now have jurisdiction over suits to which states are parties. *North Dakota v. Chicago and N. W. Ry. Co.*, 257 U. S. 485; *Texas v. Interstate Commerce Commission*, 258 U. S. 158; *State of Minnesota v. United States*, 125 F. 2d 636 (C. C. A. 8); *United States v. Montana*, 134 F. 2d 194 (C. C. A. 9).

Section 205 (c) of the Price Control Act expressly provides that the district courts shall have jurisdiction over all proceedings under Section 205 of the Act. That such a provision has the effect of superseding Section 233 of the Judicial Code, *pro tanto*, is established by *United States v. California*, 297 U. S. 175, which is directly in point. In that case, suit was instituted by the United States against the State of California to recover penalties for violations of the federal Safety Appliance Act, the State having committed such violations in the course of its operation of a state-owned railroad. This Court held that the suit was properly filed in the district court, and was not governed by the provisions of Section 233 of the Judicial Code, because that statute had

been superseded by Section 6 of the Safety Appliance Act, which provided (as does Section 205 of the Price Control Act) in general terms for enforcement of the Act and for jurisdiction over such enforcement proceedings in the federal district courts. Neither the substantive provisions of the Safety Appliance Act nor the enforcement and jurisdictional provisions made any specific mention of states or state officers. Nevertheless, this Court held that the jurisdictional provisions applied to the States equally with other railroad carriers.

IV

THE CASE DOES NOT FALL WITHIN THE JURISDICTION OF A THREE-JUDGE DISTRICT COURT UNDER SECTION 266 OF THE JUDICIAL CODE

The three-judge court statute (Sec. 266, Judicial Code; 28 U. S. C. 380), is not applicable in the present case, since no attack is made against a state statute "upon the ground of the unconstitutionality of such statute". The settled meaning of this language is that the state statute (or implementing administrative action), assailed must be in conflict with some provision of the federal Constitution itself, and not merely with a federal statute or regulation. That is, the asserted unconstitutionality of the state statute may not be indirectly derived merely from the Supremacy Clause of Article VI of the Constitution, which makes federal statutes supreme over state statutes, but must be traceable directly to an asserted

inconsistency between the state statute and the federal Constitution itself. In *Ex parte Bransford*, 310 U. S. 354, 358-359, this Court declared:

The declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment. This was decided as to § 266 in *Ex parte Buder*, and before that a similar result had been reached in *Lemke v. Farmers Grain Company* in regard to a provision of the Judicial Code granting direct appeal to this Court in cases where the sole issue was the unconstitutionality of a state statute.

In the instant case there is no contention by the Administrator addressed to any conflict between the statutes or constitution of the State of Washington and any provision of the federal Constitution. Instead the Administrator contends that the action proposed to be taken by the State Land Commissioner is in violation of the Price Control Act. The case is thus within the principle of *Ex parte Bransford, supra*, where the issue was as to the validity of an order of a state tax agency without any allegation as to the unconstitutionality of the underlying state statute. Compare *In re Buder*, 271 U. S. 461; *Hobbs v. Pollack*, 280 U. S. 168. A similar question arising under the present Act was fully considered and decided by a three-judge court in *Farmer's Gin*

Co. v. Hayes, 54 F. Supp. 43 (W. D. Okla.), which held that it lacked jurisdiction.

Query v. United States, 316 U. S. 486, cited by petitioner, did not involve a situation comparable to the present one. In that case a three-judge court was held appropriate because the claim of tax immunity there asserted by officials of an Army Post Exchange rested in part on the federal Constitution itself; the state tax order involved was accordingly viewed as having been subjected to an allegation of direct conflict with the federal Constitution, and not merely with a federal statute.

V.

ATTORNEYS APPOINTED BY THE PRICE ADMINISTRATOR ARE AUTHORIZED TO INSTITUTE AND PROSECUTE CIVIL ACTIONS ON BEHALF OF THE ADMINISTRATOR INDEPENDENTLY OF THE DEPARTMENT OF JUSTICE

Petitioner's contention that attorneys for the Administrator were not authorized to institute and prosecute the present action except with the approval and under the supervision of the Attorney General or the Department of Justice is groundless. Section 201 (a) of the Emergency Price Control Act provides in part that "Attorneys appointed under this section may appear for and represent the Administrator in any case in any court". Although Section 205 (b) of the Act provides that as to criminal cases the Administrator shall "certify the facts to the Attorney General, who may, in his discretion,

cause appropriate proceedings to be brought", Section 205 (a) provides that "whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices." The contrasting provision thus made by Congress for the handling of criminal and civil litigation is substantially the same as in the Securities Act, which was held by the Circuit Court of Appeals for the Second Circuit "to allow the Commission complete autonomy in civil prosecutions." *Securities and Exchange Commission v. Robert Collier & Co.*, 76 F. 2d 939 (C. C. A. 2).¹⁶

The history of the Price Control Act shows that Congress intended to allow the Office of Price Administration a like autonomy in its civil enforcement litigation. On November 22, 1941, while the bill, which upon enactment became the Emergency Price Control Act, was pending before the Committee on Banking and Currency of the House of Representatives the Attorney General wrote to the Chairman of the Committee calling attention to the provision of Section 201

¹⁶ The opinion in the *Collier* case was written by Judge Learned Hand, who had previously written the opinion in *Sutherland v. International Insurance Co.*, 43 F. 2d 969 (C. C. A. 2) upon which the petitioner relies. Judge Hand found no difficulty in distinguishing his prior decision on the basis of clear differences in the statutory language.

reading "Attorneys appointed under this section may appear for and represent the Administrator in any case in any court." and recommending that the bill be amended by striking the provision from the bill. The Administrator of the Office of Price Administration (which was operating under Executive Order at that period) opposed the change.¹⁷ As a result, the provision to which the Attorney General objected was retained.

Explaining the bill, the Senate Committee on Currency and Banking in its report to the Senate (Sen. Rep. 931, 77th Cong., 2d Sess.), said:

The bill also authorizes the Administrator to seek a court injunction against violations of the Act, and provides for the punishment of the most flagrant cases by criminal prosecutions subject to the supervision and control of the Department of Justice (p. 8).

Express authority is granted to attorneys employed by the Administrator to represent him in any case in any court. By virtue of the express provisions of Section 205 (b) criminal proceedings are under the supervision and control of the Attorney General (p. 20).

Both the Office of Price Administration and the Department of Justice have understood since the passage of the statute that the Administrator

¹⁷ The pertinent documents are not published but are contained in the files of the Office of Price Administration.

was entitled to representation through his own attorneys in handling civil litigation in the lower courts. This has been the consistent practice in the handling of cases since 1942. Numerous civil suits have been brought by the Administrator through his own attorneys without objection by the Attorney General or the Department, and the Solicitor General has represented the Administrator in this Court in a number of such cases.

CONCLUSION

For the above reasons, the judgment below should be affirmed.

Respectfully submitted.

✓ J. HOWARD McGRATH,

Solicitor General.

✓ ROBERT L. STERN,

Special Assistant to the Attorney General.

GEORGE MONCHARSH,

Deputy Administrator for Enforcement,

MILTON KLEIN,

Director, Litigation Division,

ABRAHAM GLASSER,

Solicitor, Litigation Division,

Office of Price Administration.

JANUARY 1946.

APPENDIX

United States Emergency Court of Appeals

No. 259

CITY OF DALLAS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

Heard at Dallas, Texas, November 28, 1945

**Before MARIS, *Chief Judge*, and MAGRUDER and
McALLISTER, *Judges*.**

**Mr. A. J. Thuss, Jr., Acting City Attorney, for
complainant.**

**Mr. Ardine A. White, Regional Enforcement
Executive, with whom Messrs. Richard H. Field,
General Counsel, Jacob D. Hyman, Associate
General Counsel, Warren L. Sharfman, Chief,
Court Review Rent Branch, and Harry H.
Schneider and Eli A. Glasser, Attorneys, all of
the Office of Price Administration, were on the
brief, for respondent.**

OPINION OF THE COURT

(Filed December 20, 1945)

By MAGRUDER, *Judge*:

**We have to decide here whether housing ac-
commodations owned by a municipal corporation**

are subject to rent control under the Emergency Price Control Act.

The Price Administrator imposed rent control in the Dallas Defense-Rental Area by regulation effective November 1, 1942. 8 F. R. 7322, 7333. Early in 1943, the City of Dallas and the State of Texas entered into an agreement for the joint construction of an arterial highway through the city, under which agreement the city undertook to acquire an unobstructed right of way of suitable width through a residential section. Pursuant thereto, the city purchased a number of parcels of real estate with dwelling houses thereon. The construction project was held in abeyance due to war-time conditions. Meanwhile, and as a temporary expedient, the city rented to tenants some 116 dwelling houses so acquired.

One of the houses purchased by the city had been owned and occupied by V. P. Phillips and wife. By deed executed January 27, 1945, they sold this property to the city for \$5400. Contemporaneously, the city contracted to rent the property back to Mr. and Mrs. Phillips on a month-to-month tenancy at \$54 per month. The freeze date in the regulation as applied to this rental area was March 1, 1942. Since on that date, and continuously up to the date of purchase by the city, the house was owner-occupied, the first rent charged by the city under its rental agreement with Mr. and Mrs. Phillips—namely, \$54—became the maximum rent pursuant to § 4 (e) of the regulation, subject, however, to the authority of the Area Rent Director at any time, on his own initiative or on application by the tenant, to order a decrease of the maximum rent

under § 5 (c) (1) on the ground that the "first rent" was higher than the rent generally prevailing in the area for comparable accommodations on the freeze date.

Acting pursuant to § 5 (c) (1), the Rent Director on April 21, 1945, after due notice to the City of Dallas as landlord, entered an order decreasing the maximum rent of the dwelling rented to Mr. and Mrs. Phillips from \$54 to \$35 per month. It is not disputed that \$35 was the rent generally prevailing for comparable accommodations on the freeze date, and that the order of the Director was therefore appropriate, apart from complainant's contention as a matter of law that municipally-owned dwelling houses are not subject to rent control.

On May 14, 1945, the City of Dallas filed with the Administrator a protest directed against the Rent Director's order of April 21, 1945, and also against those provisions of the rent regulation under which the Rent Director acted, in so far as they applied to municipally-owned housing. The Administrator denied the protest by order issued August 9, 1945, and the City of Dallas thereupon filed its complaint in this court.

The case is presented to us on the broad basis of two contentions by complainant: (1) that the Act, properly construed, does not authorize the Administrator to subject to rent control housing accommodations owned and operated by a state or political subdivision thereof, and (2) that if the Act is construed otherwise, it must be held to be unconstitutional.

On the point of statutory construction, we think complainant's argument is plainly untenable. In

this connection we follow the holding in *Bowles v. Case*, 149 F. (2d) 777 (C. C. A. 9th, 1945), and reject that in *Twin Falls County v. Hulbert*, — *Ida.* —, 156 Pac. (2d) 319 (1945), cert. granted October 22, 1945.

In defining the commodities to be subject to price control, § 302 (c) of the Act makes certain specific exemptions. Section 302 (f) broadly defines the term "housing accommodations" as meaning "any building * * * rented or offered for rent for living or dwelling purposes * * *", without any exception relating to ownership. Section 4 (a) provides that, "It shall be unlawful * * * for any person to sell or deliver any commodity * * * or to demand or receive any rent for any defense-area housing accommodations * * * in violation of any regulation or order under section 2 * * *". The term "person" is defined in language that hardly could be more inclusive. Section 302 (h) provides:

The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency.

There is nothing in the legislative history, nor is there anything in the broad declaration of policy in § 1 (a), to suggest that states or political

subdivisions thereof were intended to be exempted from price or rent regulations when engaged in selling commodities otherwise subject to regulation or in renting "housing accommodations" as defined in the Act. Certainly, the adverse effect on the economy of inflationary, unregulated prices or rents might be just as serious, whether the seller or landlord be a state or municipal corporation or a private person. See *Bowles v. Case*, *supra*. Furthermore, the City of Dallas would have no standing to file a protest with the Administrator under § 203 (a) of the Act, and no standing to file a complaint in this court under § 204 (a) upon denial of such protest, if it were not a "person" within the meaning of the Act.

Complainant insists that there is a "time-honored" and inflexible canon of statutory construction to the effect that states and political subdivisions thereof are deemed not to be included within the scope of federal legislation unless specifically referred to. It is not enough, says complainant, that the Act, after including the United States or any agency thereof by specific reference, goes on to include "any other government, or any of its political subdivisions"; the reference would have to be to "state" governments. No such rigid canon of construction is recognized in the cases. Indeed, it has many times been rejected. *Ohio v. Helvering*, 292 U. S. 360, 370 (1934); *United States v. California*, 297 U. S. 175; 186 (1936); *California v. United States*, 320 U. S. 577; 585 (1944).

In *United States v. California*, *supra*, the obligations imposed by the Federal Safety Appliance Act upon "any common carrier engaged

in interstate commerce" were held applicable to a state-owned and operated terminal railroad running along the San Francisco waterfront and engaged in interstate commerce. The court said (297 U. S. at 186):

Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it. * * * This rule had its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. * * *. The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. * * *. We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial.

We do not perceive the relevance of *Davies Warehouse Co. v. Bowles*, 321 U. S. 144 (1944), upon which complainant lays much stress in its argument on the point of statutory construction. That case involved a specific exemption in the Act relating to "rates charged by any common carrier or other public utility"; and the court decided that the term "public utility"—undefined

in the Act—applied to a public warehouse in California, the business of which is declared by the state constitution to be that of a public utility and which is subject to rate regulation under the Public Utilities Act of the state. This interpretation was adopted despite the fact that warehousing is not a business generally and traditionally regarded as a public utility and subjected to rate regulation by state regulatory bodies. The Supreme Court referred to legislative history as indicating that Congress deemed the danger of inflation to exist “only in a minor degree, if at all, from public utilities already under state price control”. In the absence of clearer expression by Congress, the court thought that Congress did not intend to supersede the power of the California regulatory commission exercising control over warehouse rates; nor did it think that considerations of nation-wide uniformity in the application of the Emergency Price Control Act to warehousing charges were so compelling as to indicate a contrary conclusion. It is one thing to rely upon state regulatory bodies to resist inflation of public utility rates. It is quite another thing to rely upon the *self-restraint* of states or municipalities when, in a time of wartime scarcities, they are engaged in the business of selling commodities or renting housing accommodations. As we have already seen, the Act expressly confers upon the Price Administrator power to regulate prices or rents charged by the United States or any of its agencies. It is fanciful to suppose that, when § 302 (h) goes on to include “any other government, or any of its political subdivisions”, Con-

gress was referring only to foreign governments, and not to state governments also.

Coming then to the constitutional point, we must reject complainant's proposition that Congress is without power to subject state- or municipally-owned and operated housing to rent control. *Bowles v. Case, supra*. In support of this argument, complainant refers to the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Citation of the Tenth Amendment does not advance the argument much. "The amendment states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U. S. 100, 124 (1941). "The Tenth Amendment does not operate as a limitation upon the powers, express or implied, delegated to the national government." *Fernandez v. Wiener*, — U. S. —, decided December 10, 1945. See also *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 428 (1940).

It is settled that, under its plenary war powers, Congress may constitutionally protect the national economy from disastrous inflation by imposing price and rent controls. *Yakus v. United States*, 321 U. S. 414 (1944); *Bowles v. Willingham*, 321 U. S. 503 (1944). Such controls are, or may reasonably be deemed by Congress to be, a vital necessity without regard to the identity of the sellers or landlords. If a state or municipality chooses to engage in selling commodities or renting dwelling houses, it must do so in subordina-

tion to the war power of Congress to control prices and rents just as the State of California, in *United States v. California*, 297 U. S. 175 (1936), by engaging in interstate commerce by rail, subjected itself to the plenary power of Congress over interstate commerce. See also *California v. United States*, 320 U. S. 577 (1944).

Complainant invokes the analogy of the implied constitutional immunity of state instrumentalities from the federal taxing power. In this case we do not have to go so far as to hold that the war powers of Congress are subject to no analogous implied qualifications in favor of the states. Cf. *United States v. California*, *supra*, 297 U. S. at 184-5. It is enough to say that, if any such state immunities are to be implied, they could not in reason be more extensive than the recognized state immunity from federal taxation. Such tax immunity has been implied from the nature of our federated constitutional system, in order to assure to the states the full exercise of their essential governmental functions in their appropriate sphere. However, when a state engages in the sale of commodities, it is subject to federal excise taxes. *Ohio v. Helvering*, 292 U. S. 360 (1934). In the case at bar, the City of Dallas acquired the dwelling houses in question in the exercise of its governmental function of constructing highways. But it is obvious that the federal government is not in any substantial way interfering with the city's discharge of that governmental function, when it subjects the city-owned dwellings to a generally applicable rent regula-

tion during such time as the city chooses to put the dwellings on the rental market. It is immaterial that the renting was in a sense incidental to the performance of an orthodox "governmental" activity. *Bowles v. Texas Liquor Control Board*, 148 F. (2d) 265 (C. C. A., 5th, 1945).

A judgment will be entered dismissing the complaint.

SUPREME COURT OF THE UNITED STATES.

No. 261.—OCTOBER TERM, 1945.

Otto A. Case, as Commissioner of
Public Lands of the State of Wash-
ington, Petitioner,

vs.

Chester Bowles, Administrator, Office
of Price Administration, and Sound-
view Pulp Company.

On Writ of Certiorari to
the United States Court
of Appeals for the Ninth
Circuit.

[February 4, 1946.]

Mr. Justice BLACK delivered the opinion of the Court.

The Congressional Enabling Act providing for the State of Washington's admission to the Union granted certain lands to that State "for the support of common schools". 25 Stat. 676, 679. Section 11 of the Enabling Act provided that these lands should "be disposed of only at public sale, and at a price not less than ten dollars per acre . . .". The State Constitution provides that these lands shall not be sold except "at public auction to the highest bidder" at a price which may not be below both the full market value found after appraisal, and "the price prescribed in the grant" of these lands. In 1943 the State Commissioner of Public Lands held a public auction for the sale of timber on school lands. At that auction the Soundview Pulp Company, one of the respondents, bid \$86,335.39 for some of the timber. This amount exceeded by approximately \$9,000.00 the ceiling price fixed by Maximum Price Regulation No. 460.¹ The Price Administrator advised Soundview that consummation of the sale at the bid price would constitute a violation of the Regulation and of the Emergency Price Control Act.² Thereafter Soundview and the unsuccessful bidder, Coos Bay Pulp Corporation, commenced actions in the State Courts, seeking an adjudication as to the legality of Soundview's bid and of the proposed transfer of timber to Soundview. This resulted in a holding by the State Supreme Court that the Emergency Price

¹ 8 Fed. Reg. 11850, as amended.

² 56 Stat. 23, 58 Stat. 640; Public Law No. 108, 79th Cong., 1st Sess.

Control Act did not bar the sale of school-land timber at prices above the ceiling. *Soundview Pulp Co. v. Taylor*, 21 Wash. (2d) 261. When, after this judgment was rendered, the parties were about to complete the sale, the Price Administrator commenced this action in the federal District Court to enjoin the State Commissioner of Public Lands and Soundview from completing the timber transaction at a price above the ceiling fixed by the Regulation. The District Court held that the Emergency Price Control Act did not grant the Price Administrator authority to set maximum prices for school-land timber sold by the State. The Circuit Court of Appeals reversed. 149 F. 2d 777. Because the Circuit Court's decision conflicted with that of the Supreme Court of Idaho in *Twin Falls County v. Hulbert*, 156 Pac. 2d 319, we granted certiorari in both cases.

Before considering the principal questions raised by the State we shall at the outset briefly dispose of certain procedural contentions. The State urges that the complaint should have been dismissed because it was signed by attorneys employed by the Price Administrator and not by the District Attorney or members of the Department of Justice. True, 28 U. S. C. 485 makes it the duty of every district attorney to prosecute most civil actions to which the United States is a party. But this section does not prescribe the procedure under the Emergency Price Control Act for that Act specifically empowers the Administrator to commence actions such as this one and authorizes attorneys employed by him to represent him in such actions. § 201(a). The State contends further that this case should have been tried by a district court composed of three judges because Section 266 of the Judicial Code requires such a proceeding whenever enforcement of a state statute is sought to be enjoined on the ground that the statute is unconstitutional. But here the complaint did not challenge the constitutionality of the State statute but alleged merely that its enforcement would violate the Emergency Price Control Act. Consequently a three-judge court is not required. *Ex parte Bransford*, 310 U. S. 354, 358-359; *Query v. United States*, 316 U. S. 486, 488-489. Another procedural point urged by the State is that since this is in effect a controversy between the United States and the State of Washington, the United States Supreme Court has exclusive jurisdiction under Article 3, Section 2, Clause 2, of the United States Constitution and the District Court lacked power to try the case. But it is well settled that despite Article

3. Congress can give the district courts jurisdiction to try controversies between a state and the United States.³ Congress has given the district court power to try cases such as this one. While Section 233 of the Judicial Code does give this Court exclusive jurisdiction to try cases between a state and the United States, section 205(c) of the Emergency Price Control Act specifically provides that the District Court shall have jurisdiction over all enforcement suits. To that extent section 205(c) of the Price Control Act supersedes section 233 of the Judicial Code. *United States v. California*, 297 U. S. 175, 186.

The State's principal contention is that sales by a state, such as the one here involved, are not and cannot be made subject to price control. Maximum Price Regulation No. 460 which the State's sale of timber allegedly violated, specifically provides that it is applicable to sales by states. The State makes the following contentions: (1) Insofar as the Regulation applies to state sales it is unauthorized by the Emergency Price Control Act, since Congress did not intend that Act to apply to states. (2) Even if the Act was intended to apply to state sales, the Act should not be construed as authorizing the Price Administrator to fix a maximum price at which timber on schoolland grants can be sold by states. (3) If the Act is so construed, it violates the Fifth and Tenth Amendments to the Constitution.

We ordinarily would not pass on the statutory authority of the Administrator to promulgate the Regulation in a proceeding such as this one. For Congress has granted exclusive initial jurisdiction to determine this question to the Emergency Court of Appeals. *Lockerty v. Phillips*, 319 U. S. 182. But with the Act thus denying a defendant in an enforcement proceeding the right to challenge the validity of the Regulation, it does not deny him the right to attack the Emergency Price Control Act itself on Constitutional grounds. *Yakus v. United States*, 321 U. S. 414, 430. Of course, this right may not be utilized as a means of indirectly attacking the regulations themselves instead of the statute. But here petitioner's third contention that Congress lacks authority to regulate the prices of state school-land timber extends beyond the implementing regulation and strikes at the Act itself. In order to reach this Constitutional question, we first have to decide whether the Act properly interpreted, is ap-

³ *Ames v. Kansas*, 111 U. S. 449; *United States v. Louisiana*, 123 U. S. 321; *United States v. California*, 297 U. S. 175.

plicable to sales by states, including sales of timber on school grant lands.

The Emergency Price Control Act grants to the Price Administrator broad powers to set maximum prices for commodities and rents and makes it unlawful for "any person" to violate these maximum price regulations. Section 302(h) defines a "person" as including "an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing." This language on its face, and given its ordinary meaning, would appear to be broad enough to include any person, natural or artificial, or any group or agency, public or private, which sells commodities⁴ or charges rents. The argument that the Act should not be construed so as to include a state within the enumerated list made subject to price regulation, rests largely on the premise that Congress does not ordinarily attempt to regulate state activities and that we should not infer such an intention in the absence of plain and unequivocal language. Petitioner presses this contention so far as to urge us to accept as a general principle that unless Congress actually uses the word "state", courts should not construe regulatory enactments as applicable to the states. This Court has previously rejected similar arguments,⁵ and we cannot accept such an argument now.

We think it too plain, to call for extended discussion, that Congress meant to include states and their political subdivisions when it expressly made the Act applicable to the United States "or any other government, or any of its political subdivisions, or any agency of any of the foregoing." Congress clearly intended to control all commodity prices and all rents with certain specific exceptions, which it declared. It would frustrate this purpose for courts to read exemptions into the Act which Congress did not see fit to put in the language. Excessive prices

⁴ Section 302 of the Act defines "commodity" as including "services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of, purchase or sale of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity."

⁵ *Ohio v. Helvering*, 292 U. S. 360, 370; *United States v. California*, 297 U. S. 175, 186; *California v. United States*, 320 U. S. 577, 585.

for rents or commodities charged by a state or its agencies would produce exactly the same conditions as would be produced if these prices charged by other persons. We, therefore, have no doubt that Congress intended the Act to apply generally to sales of commodities by states.⁶

Nor can we accept the contention that a special exemption could be read into the Act in order to permit states holding land granted for school purposes to charge more than the ceiling price set for timber. In reaching this conclusion we are not unaware of the difficulties which confronted the Commissioner of Public Lands of the State of Washington, nor of the importance of protecting the public interest in these school lands. Both the Act of Congress, which granted the land to Washington, and the Constitution of the State, had provided for safeguards in connection with the disposition of school lands. We do not question the wisdom of these precautions. We are mindful also of the fact that this Court has declared that grants of land to the state, like those here involved, transferred exclusive ownership and control over those lands to the state. *Chapman v. Roberts*, 339 U. S. 173. No part of all the history concerning these grants, however, indicates a purpose on the part of Congress to enter into a permanent agreement with the states under which states would be free to use the lands in a manner which would conflict with valid legislation enacted by Congress in the national interest. Here again, the sale of school-land timber at above ceiling prices could be just as disturbing to the national inflation control program as the charging of excess prices for timber located on any other lands.

We now turn to petitioner's Constitutional contention. Though as we have pointed out petitioners have alleged that the Act applied to setting a maximum price for school-land timber violates the Fifth and Tenth Amendments, the argument here seems to spring from implications of the Tenth Amendment only. The contention rests on the premise that there is a "doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." It is not contended, and could not be under our prior decisions, that the ceiling price fixed by the Administrator is Constitution-

⁶ The Emergency Court of Appeals recently considered the same question and reached the same conclusion. *City of Dallas v. Bowles*, 2 Fed. 2d —.

ally invalid as applied to privately owned timber. *Yakus v. United States*, 321 U. S. 414; *Bowles v. Willingham*, 321 U. S. 503. Nor is it denied that the Administrator could have fixed ceiling prices if the state had engaged in a sales business "having the incidents of similar enterprise usually prosecuted for private gain". *Allen v. Regents of University System*, 304 U. S. 439, 452. But it is argued that the Act cannot be applied to this sale because it was ~~not~~ for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens. Since the Emergency Price Control Act has been sustained as a Congressional exercise of the war power, the petitioners' argument is that the extent of that power as applied to state functions depends on whether these are "essential" to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable,⁷ and we reject it as a guide in the field here involved. *U. S. v. California*, *supra*, 297 U. S. at 183-185.

The State of Washington does have power to own and control the school-lands here involved and to sell the lands or the timber growing on them, subject to the limitations set out in the Enabling Act. And our only question is whether the state's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for state sales or to control rents charged by a state might result in depriving Congress of ability effectively to prevent the evil of inflation at which the Act was aimed. The result would be that the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the federal government's establishment.

To construe the Constitution as preventing this would be to read it as a self-defeating charter. It has never been so interpreted. Since the decision in *McCulloch v. Maryland*, 4 Wheat 316, 420, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with other parts

⁷ See the several opinions in *Saratoga Springs Co. v. United States*, No. 5, decided January 14, 1946.

of the Constitution. And we have said, that the Tenth Amendment "does not operate as a limitation upon the powers, express or implied, delegated to the National Government."

Where as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article VI provides that "The Constitution and the Laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land."

Affirmed.

Mr. Justice DOUGLAS would reverse the judgment for the reasons set forth in his dissenting opinion in *Hulbert v. Twin Falls County*, No. 238, decided this day.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

* *Fernandez v. Wiener*, — U. S. —, decided December 10, 1945. *United States v. Darby*, 312 U. S. 100, 124; *California v. United States*, *supra*; *United States v. California*, *supra*; *Oklahoma v. Atkinson Co.*, 313 U. S. 508, 534-535.

² For application of this principle see *Hines v. Davidovitz*, 312 U. S. 52, 68; *Stewart & Co. v. Sadrakula*, 309 U. S. 94, 104.